

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GLEN WHORTON, DIRECTOR, :

4 NEVADA DEPARTMENT OF :

5 CORRECTIONS, :

6 Petitioner, :

7 v. : No. 05-595

8 MARVIN HOWARD BOCKTING. :

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10 Washington, D.C.

11 Wednesday, November 1, 2006

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13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United  
15 States at 11:04 a.m.

16 APPEARANCES:

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18 Las Vegas, Nev.; on behalf of the Petitioner.

19 IRVING L. GORNSTEIN, ESQ., Assistant to the  
20 Solicitor General, Department of Justice,  
21 Washington, D.C.; on behalf of the United  
22 States as amicus curiae.

23 FRANCES A. FORSMAN, ESQ., Las Vegas, Nev.; on  
24 behalf of the Respondent.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	GEORGE J. CHANOS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	IRVING L. GORNSTEIN, ESQ.,	
7	On behalf of the United States,	
8	as amicus curiae	17
9	ORAL ARGUMENT OF	
10	FRANCES A. FORSMAN, ESQ.	
11	On behalf of the Respondent	25
12	REBUTTAL ARGUMENT OF	
13	GEORGE J. CHANOS, ESQ.	
14	On behalf of the Petitioner	45
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Whorton versus Bockting.

General Chanos.

ORAL ARGUMENT OF GEORGE J. CHANOS

ON BEHALF OF PETITIONER

MR. CHANOS: Mr. Chief Justice, and may it please the Court:

Crawford v. Washington should not apply retroactively to cases on collateral review because it fails to meet the exacting standards for retroactivity established by this Court in Teague versus Lane. In addition, respondent is not entitled to relief under AEDPA. Teague held that new rules of criminal generally should not apply to cases on collateral review unless they fall within one of two narrow exceptions. The second exception, at issue here, is for those new watershed rules of criminal procedure without which the likelihood of an accurate conviction is seriously diminished, rules that alter our understanding of the bedrock procedural elements essential to a fair proceeding. Crawford is not a watershed rule of criminal procedure.

JUSTICE GINSBURG: Could you give an

1 example, General Chanos, of one that is other than  
2 Gideon? Is there any other one, or --

3 MR. CHANOS: The only example that this  
4 Court has pointed to in its 25 years of retroactivity  
5 jurisprudence is Gideon versus Wainwright.

6 JUSTICE GINSBURG: And none other occurs to  
7 you?

8 MR. CHANOS: None other occurs to me at this  
9 time. None of the cases that this Court has ruled are  
10 not retroactive would I find to be retroactive or  
11 watershed, and I certainly don't find Crawford to be  
12 watershed. Crawford is not watershed because it is not  
13 a rule without which the likelihood of an accurate  
14 conviction is seriously diminished and it is not a rule  
15 which altered our understanding of the bedrock  
16 procedural elements essential to a fair proceeding.

17 CHIEF JUSTICE ROBERTS: I take it from your  
18 presentation you think we do have to go through the  
19 Teague analysis. We can't just rely on 2254(d)(1)?

20 MR. CHANOS: No, Chief Justice Roberts. I  
21 believe that you could go straight to 2254(d)(1) and bar  
22 relief under 2254(d)(1).

23 CHIEF JUSTICE ROBERTS: Well then, what do  
24 you do about 2254(e)(1), or I guess (e)(2), which seems  
25 to suggest at different rule if a case is made

1 retroactive?

2 MR. CHANOS: Well, 2254(e)(2) provides a  
3 cause and prejudice opportunity in the event that the  
4 state court denies relief on a procedural basis rather  
5 than a substantive basis and the petitioner can show  
6 cause and prejudice under 2254(e)(2)(A). The Federal  
7 court could then look at the petitioner's claim because  
8 no merits determination had been made by the state court  
9 and, finding the cause and prejudice elements under  
10 2254(e)(2), the Federal court would not be precluded  
11 from making a merits determination since the -- and  
12 conceivably applying a rule that had been made  
13 retroactive active under Teague -- because the state  
14 court had not made a substantive merits determination.

15 CHIEF JUSTICE ROBERTS: Now, my point was  
16 that looking at (d)(1), it says is the decision contrary  
17 to established law. And I would have thought that if  
18 it's a new decision it's clearly not contrary to  
19 established law.

20 MR. CHANOS: Correct.

21 CHIEF JUSTICE ROBERTS: But on the other  
22 hand, you look at (e)(2) and it says here's what you do  
23 if you're applying a new decision that's that been made  
24 retroactive. So I would have thought that meant you  
25 can't say simply because it's a new decision it won't

1 apply.

2 MR. CHANOS: Our reading of 2254(d)(1) is  
3 that Congress intended to have the federal courts give  
4 the state courts deference to the extent that the state  
5 courts made a substantive determination. If the state  
6 courts made no substantive determination, there's no  
7 requirement for deference by the Federal courts, which  
8 under 2254(e)(2)(A)(i) the Federal court conceivably  
9 find that there was cause and prejudice under  
10 2254(2)(a)(i) under the standards enumerated in those  
11 subparagraphs (a) and (b) and could then make a merits  
12 determination.

13 There would be nothing that would preclude  
14 the Federal court from making a merits determination so  
15 long as the state court had not already made a merits  
16 determination.

17 JUSTICE GINSBURG: Well, suppose the state  
18 has, which is going straight to AEDPA. Does that mean  
19 that Teague is out entirely, even the first category,  
20 that is a decision, a substantive decision that would  
21 mean that what defendant did was not a crime?

22 MR. CHANOS: Yes, Justice Ginsburg. It  
23 would mean under -- under a plain meaning reading of  
24 2254(d)(1), if the state court made a determination on  
25 the merits, it would bar subsequent Federal review

1 whether it was a substantive, a substantive claim or a  
2 procedural claim. However, in Atkins v. Kentucky there  
3 would be nothing that would prevent the petitioner from  
4 going back to the state court and arguing cause and  
5 prejudice, and then if the state court were to make a  
6 procedural determination on the second petition that  
7 was -- that were to deny the petitioner his claim, he  
8 could take that to the Federal court. The Federal court  
9 could then look at that because it was only a procedural  
10 determination by the state court on the second habeas  
11 claim and the Federal court at that point could look  
12 back at the substantive rule as established law because  
13 on the second claim they have the right, if he's only  
14 denied a procedure -- on a procedural basis, there's  
15 nothing that would preclude the Federal court on his  
16 second claim from looking back at what would then be  
17 established law.

18 JUSTICE KENNEDY: What is the source of the  
19 rule in Teague? Could Congress overturn the rule in  
20 Teague if it wanted to and say that nothing is  
21 retroactive or that everything is retroactive?

22 MR. CHANOS: My understanding is that the  
23 rule in Teague is -- the source is not the U.S.  
24 Constitution. It's a judicially created rule that began  
25 with Linkletter and developed into Teague and its

1 progeny. And yes, I believe Congress could pass  
2 2254(d)(1) and alter the habeas procedures, as they have  
3 in enacting 2254(d)(1).

4 JUSTICE SCALIA: Habeas is an equitable --

5 MR. CHANOS: I'm sorry?

6 JUSTICE SCALIA: Habeas is equitable relief  
7 and the Court has a lot of discretion in identifying the  
8 boundaries of equitable relief, doesn't it?

9 MR. CHANOS: Yes, Justice Scalia.

10 JUSTICE SCALIA: I assume that's how we got  
11 to Teague.

12 JUSTICE STEVENS: Let me ask this question  
13 as to the basic issue of whether you should be relying  
14 on Teague or the statute. If you're relying just on the  
15 statute, how would it apply to a case which was correct  
16 under established law at the time that the state court  
17 made its ruling, but before the case reached the  
18 appellate court, in which there was a change in our  
19 interpretation? What if this case -- if Crawford had  
20 been decided while the case was on appeal?

21 MR. CHANOS: While under the Court's  
22 retroactivity jurisprudence Griffith would control,  
23 under 2254 it would not. 22(d)(1) would control.

24 JUSTICE STEVENS: So it really makes a  
25 difference whether we rely on Teague or whether we rely

1 on the statute if we disagree with you?

2 MR. CHANOS: It make difference. It makes a  
3 difference.

4 JUSTICE SCALIA: Well, I assume there would  
5 be a Rule 60(b) motion or the equivalent of it in state  
6 court.

7 MR. CHANOS: Yes.

8 JUSTICE SCALIA: If indeed our law had  
9 changed; don't you think?

10 MR. CHANOS: Absolutely.

11 JUSTICE SCALIA: I mean, it's inconceivable  
12 that the problem wouldn't be solved in some fashion by  
13 the state court that rendered the decision.

14 MR. CHANOS: I believe that the petitioner  
15 would be able to make a subsequent habeas petition at  
16 the state court level and if they were somehow denied  
17 relief on a procedural basis, there would be nothing  
18 that would preclude the Federal court from granting them  
19 relief thereafter.

20 JUSTICE GINSBURG: That's a odd position to  
21 take, to proliferate proceedings that way. I mean, I  
22 thought your argument, AEDPA argument, was: Too bad,  
23 the Federal court is out of it, but the state court is  
24 most likely, recognizing that this Court has said what  
25 this man did wasn't a crime, to grant him relief. But

1 if you're making this two-step and saying, but somehow  
2 we can change the substantive proceeding into a  
3 procedural proceeding, that seems to me odd, to  
4 proliferate proceedings that way.

5 MR. CHANOS: Justice Ginsburg, what we're  
6 saying is that Congress in enacting 2254(d)(1) was  
7 stating that the Federal courts should give deference to  
8 the state court decision so long as it is a merits  
9 decision and so long as it complies with existing  
10 clearly established law and is not unreasonable.

11 And if that occurs, then Congress under  
12 2254(d)(1) was saying give state courts deference under  
13 those circumstances.

14 JUSTICE SCALIA: You're saying not just  
15 "clearly"; "then clearly established law."

16 MR. CHANOS: That's exactly.

17 JUSTICE SCALIA: That is, at the time of the  
18 state court decision. \*END STENO

19 MR. CHANOS: Exactly, absolutely, at the  
20 time of the state court decision. In fact, if you look  
21 at the language of 2254(d)(1) it says "resulted in a  
22 decision that was contrary to or an unreasonable  
23 application of clearly established Federal law. It  
24 doesn't say "is contrary to clearly established law."  
25 It says "was contrary to."

1

2 JUSTICE STEVENS: The word was is somewhat  
3 ambiguous. It could either mean at the time of the  
4 trial court's decision or at the time of the final  
5 judgment on appeal.

6 MR. CHANOS: Well, in either case, it is  
7 referring to the --

8 JUSTICE STEVENS: I know you win under  
9 either view, but --

10 MR. CHANOS: Yes, exactly.

11 JUSTICE STEVENS: -- it could mean either of  
12 those two things.

13 MR. CHANOS: Our, our position would be that  
14 it would be up to when the decision became final.  
15 Whatever the law was up to the time that the decision,  
16 the state court decision became final, that is what was  
17 clearly established law.

18 I'll continue with our Teague analysis  
19 because we believe that the claim is barred under either  
20 analysis. The --

21 JUSTICE KENNEDY: Crawford did use the term  
22 bedrock?

23 MR. CHANOS: Yes. Yes. And what  
24 Crawford -- what we believe Crawford was saying -- well,  
25 Crawford said that the Sixth Amendment right to

1 confrontation is bedrock. It didn't say that that  
2 decision altered our understanding of the bedrock  
3 procedural elements essential to a fair trial. That is  
4 the standard. Not whether or not the Sixth Amendment is  
5 bedrock.

6 In fact, if you look at the case of Gideon  
7 versus Wainwright and Betts versus Brady, in Betts  
8 versus Brady this Court had held the Sixth Amendment  
9 right to counsel was not applicable to the states  
10 through the 14th Amendment. Gideon overruled Betts  
11 versus Brady and said that the Sixth Amendment right to  
12 counsel was applicable to the states under the 14th  
13 Amendment.

14 That alters our understanding of the bedrock  
15 procedural elements that are essential to a fair trial.  
16 In one case, we're saying rights of counsel is not one  
17 of those bedrock procedural elements. Is not,  
18 therefore, applicable to the states under the 14th  
19 amendment, Betts versus Brady. In the next case we're  
20 saying right to counsel is it implicit in the  
21 Constitution. It is an essential to the fairness of a  
22 proceeding, and it is therefore applicable to the states  
23 under the 14th Amendment.

24 That truly alters our understanding of the  
25 bedrock procedural elements that are essential to a fair

1 trial.

2 In contrast, when you look at Crawford  
3 vis-a-vis Ohio versus Roberts, the -- there's a real  
4 distinction there. In both cases, we know that the  
5 right to confrontation is essential and Federal and one  
6 of those bedrock elements that are essential to a fair  
7 proceeding. Therefore Crawford doesn't alter our  
8 understanding of what elements are or are not essential  
9 to -- bedrock elements essential to a fair proceeding.  
10 Instead it modifies the contours --

11 JUSTICE STEVENS: You make the same analysis  
12 if you say the right is not necessarily the right of  
13 confrontation but the narrower right of  
14 cross-examination.

15 MR. CHANOS: Would I make the same analysis?

16 JUSTICE STEVENS: Because that is central to  
17 Crawford.

18 MR. CHANOS: Yes. Yes. Crawford doesn't  
19 tell us that the rights to confrontation or the right of  
20 cross-examination is a new right as Gideon tells us.  
21 Instead Crawford tells us --

22 JUSTICE KENNEDY: Well, there is a new  
23 emphasis on cross-examination.

24 MR. CHANOS: It alters, it modifies the  
25 manner in which we implement that right. Under Ohio

1 versus Roberts there was plenty of cross-examination  
2 that was occurring. The standard under Ohio versus  
3 Roberts was unavailability and inadequate indicia of  
4 reliability. There was a reliability screen in place,  
5 and it was clear under Ohio versus Roberts that the  
6 right to confrontation was an essential bedrock right,  
7 essential to a fair trial.

8 JUSTICE SCALIA: Exactly. But you know, how  
9 you play the game depends upon at what level of  
10 generality you describe the right. And I agree with you  
11 if you describe the right as the right to  
12 cross-examination, that -- that was -- reinstated by  
13 Crawford, which said that the confrontation right is a  
14 right to confrontation -- to cross-examination, which  
15 didn't exist before. I mean, you could dispense with  
16 that right of cross-examination if there were indicia of  
17 reliability.

18 MR. CHANOS: Well, there were --

19 JUSTICE SCALIA: I'm not sure that you can  
20 so -- in such a facile fashion decide what is a bedrock  
21 principle. Frankly, I don't know any formula that  
22 would -- that would describe it. I really think it is  
23 a -- you know it when you see it.

24 MR. CHANOS: Well, Justice Scalia --

25 JUSTICE SCALIA: It is like obscenity.

1 (laughter.)

2 MR. CHANOS: I understand. The other point  
3 that --

4 JUSTICE SOUTER: That gets, if you follow  
5 Justice Scalia's argument, that gets you to, I think to  
6 the argument you have made. And that is all right, we  
7 have got to look at it pragmatically. I mean, what are  
8 the consequences of following a reliability model rather  
9 than a cross-examination model? And your argument is  
10 consequences that are not necessarily more favorable to  
11 defendants, in fact -- or more productive of ultimately  
12 reliable determinations, in fact. And that I take it is  
13 your basic point.

14 So I think you've answered what for all of  
15 us is a problem. And that is we don't have a clear  
16 analytical definition of bedrock; but if we look to  
17 consequences, you have got an argument. Your friends  
18 don't think it is a good one, but that's your point.

19 MR. CHANOS: The other point is that there's  
20 a second component to watershed which is it must be a  
21 rule without which the accuracy of a proceeding is  
22 seriously diminished. There was cross-examination under  
23 Ohio versus Roberts. There -- in Crawford, the language  
24 of Crawford isn't a sweeping indictment of -- of  
25 Roberts.

1 JUSTICE KENNEDY: Well, there wasn't  
2 cross-examination by defense counsel.

3 MR. CHANOS: I'm sorry?

4 JUSTICE KENNEDY: In this case there wasn't  
5 cross-examination by defense counsel. Or am I  
6 incorrect?

7 MR. CHANOS: There was cross-examination of  
8 the mother, there was cross-examination of the police  
9 detective -- there was cross-examination of --

10 JUSTICE KENNEDY: Oh, oh. No, I mean of the  
11 witness.

12 MR. CHANOS: Not of Autumn -- not of Autumn  
13 Bockting. But the important point that I want to make  
14 before I reserve the balance of my time is that the  
15 question isn't simply, is Crawford accuracy-enhancing?  
16 The question is is it a rule without which the accuracy  
17 of a proceeding is seriously diminished. In other words  
18 must all --

19 JUSTICE SOUTER: -- accuracy-enhancing then?

20 MR. CHANOS: I'm sorry?

21 JUSTICE SOUTER: It's a question about how  
22 much more accuracy-enhancing, if at all?

23 MR. CHANOS: That, and it is really an  
24 analysis of Roberts. Is, is that judicial determination  
25 of reliability under adequate indicia of reliability, so

1 fundamentally flawed that all of the decisions that  
2 were, that were arrived at pursuant to its authority  
3 must be undone, and new trials must occur with respect  
4 to those decisions because it is so fundamentally  
5 flawed. And our point is that it is not. It does not  
6 rise to that level of inadequacy and Crawford is  
7 therefore not a rule without which the accuracy of a  
8 proceeding is seriously diminished.

9 Mr. Chief Justice, may I reserve the balance  
10 of my time?

11 CHIEF JUSTICE ROBERTS: Thank you General  
12 Chanos.

13 Mr. Gornstein, we will hear now from you.

14 ORAL ARGUMENT OF IRVING L. GORNSTEIN, ON BEHALF OF  
15 THE UNITED STATES AS AMICUS CURIAE, SUPPORTING  
16 PETITIONER

17 MR. GORNSTEIN: Mr. Chief Justice, and may  
18 it please the Court.

19 Crawford does not satisfy either of the two  
20 requirements for a retroactive watershed rule. The  
21 application of Roberts rather than Crawford did not so  
22 seriously diminish the likelihood of accurate  
23 convictions as to require the wholesale reopening of  
24 convictions that were final before Crawford was decided,  
25 with all the societal costs that entails.

1 CHIEF JUSTICE ROBERTS: Since you barely  
2 cite AEDPA, I think you assume we need to reach the  
3 Teague question before the AEDPA question.

4 MR. GORNSTEIN: Mr. Chief Justice, we do not  
5 have an interest in the AEDPA question because it does  
6 not apply to Federal convictions, the 2254(d)(1), and  
7 there is no Federal conviction analog to 2254(d)(1), so  
8 we are not telling you that you should or should not  
9 reach it. We just don't have an interest in that  
10 question.

11 CHIEF JUSTICE ROBERTS: It is law that is  
12 applied in Federal court, though. I assume you have an  
13 interest in that.

14 MR. GORNSTEIN: Well, we have a general  
15 interest in the way law is applied in Federal court but  
16 we do not ordinarily opine on issues just on that basis  
17 and we haven't in the past opined on AEDPA issues unless  
18 they have some Federal analog carryover effect. And we  
19 did not here.

20 Now with respect to the reliability prong of  
21 the Teague analysis, there are three reasons that the  
22 Roberts rule did not so seriously diminish the  
23 likelihood of accurate convictions as to call for  
24 retroactive application of Crawford.

25 The first is that Roberts had a built-in

1 reliability screen. Hearsay could not be admitted under  
2 Roberts unless a determination was made that there were  
3 particularized guarantees of trustworthiness.

4           The second reason that Roberts did not  
5 seriously diminish the likelihood of accurate  
6 convictions is that there were other procedural  
7 components that operated in tandem with Roberts to  
8 promote accuracy. They included the right to  
9 cross-examine the witness through whom an hearsay  
10 statement was introduced, the right to introduce your  
11 own evidence to challenge the reliability of the hearsay  
12 statement. Defense counsel could point out to the jury  
13 all the weaknesses in the hearsay statement and the  
14 defendant could count on the common sense of the jury to  
15 weigh the reliability of the hearsay statement in light  
16 of all the evidence in the case.

17           JUSTICE ALITO: Can't you make that argument  
18 about any, about cross-examination in general? It is  
19 debatable whether -- how good cross-examination is in  
20 determining the truthfulness of a witness's testimony.  
21 Now, our Constitution decides the issue one way, but any  
22 infringement of cross-examination could be susceptible  
23 to the same argument that you are making.

24           MR. GORNSTEIN: Yes. And I don't think that  
25 this is a self-sufficient argument for that reason. It

1 is just one component of the argument about why there  
2 was reliability. The fact that there was a Roberts  
3 screen on reliability is an additional factor that  
4 distinguishes my example from what you said.

5 And the fact is that there was a right to  
6 cross-examine live witnesses here. So there was a right  
7 to cross-examine the police officer through whom this  
8 hearsay statement was made. It is not a case where  
9 there was an across-the-board denial of any  
10 cross-examination.

11 JUSTICE KENNEDY: Well I guess you're asking  
12 us to say Crawford, get one, take one, it is really not  
13 that important. If that's so, I suppose we shouldn't  
14 have overruled Roberts.

15 MR. GORNSTEIN: No, I think Crawford that is  
16 an important decision. But if you made retroactive  
17 every one of your important decisions, you would be  
18 reversing the rule of Teague. What Teague says that is  
19 there is not -- that the purposes of habeas corpus are  
20 largely exhausted once somebody has received a trial in  
21 accordance with then existing law.

22 Because of the importance of finality to the  
23 system -- and there are only going to be two very --  
24 there's only a very narrow window for watershed rules,  
25 of rules that, the accuracy of proceedings beforehand

1 are so seriously diminished that there is an  
2 unacceptably large risk that systematically, innocent  
3 people were being convicted, and that this is a rule  
4 that approaches Gideon in its fundamental and sweeping  
5 importance. Those are the only circumstances in which  
6 the Court is going to go back on finality.

7 JUSTICE GINSBURG: How many times have we  
8 dealt with a quote, "new rule," with the argument made  
9 that it was watershed and therefore should be  
10 retroactive? This is not the first time.

11 MR. GORNSTEIN: No, I think that there have  
12 been -- I don't know the exact number, but maybe 11 or  
13 12, about half of which are ones, are proposed new rules  
14 and half of which are ones where the rule was already  
15 established previously and the question was whether it  
16 was going to be made retroactive. And I cited in the  
17 brief there are three or four death penalty cases where  
18 the Court had already established before each one of  
19 them there was a right not to be -- the death penalty to  
20 be arbitrarily imposed. And in each case there was a  
21 new rule that built on that basic rule in an important  
22 way; but in each case, the Court said it was not the  
23 kind of rule that was going to be applied retroactively.  
24 And so, too, here.

25 The third reason I wanted to give about why

1 there was not a serious diminishment in accuracy that is  
2 in at least one respect, the Roberts rule actually  
3 promotes more accuracy than the Crawford rule, and  
4 that's with respect to non-testimonial hearsay. In the  
5 case of non-testimonial hearsay, under Roberts, that  
6 could come in only if determination had been made there  
7 were particularized guarantees of trustworthiness.  
8 Whereas under the Crawford rule, that kind of  
9 non-testimonial hearsay comes in without any reliability  
10 check under the Constitution at all.

11 JUSTICE KENNEDY: But that's not this case.

12 MR. GORNSTEIN: Well there was actually in  
13 this case the mother's testimony about what the daughter  
14 said to her.

15 JUSTICE KENNEDY: I'm talking about the  
16 daughter's testimony.

17 MR. GORNSTEIN: Yes. The daughter's  
18 testimony about what she said to the mother illustrates  
19 the difference, because that came in through the mother.  
20 It only came in because there was a particularized  
21 guarantees of trustworthiness to that statement; whereas  
22 under Crawford in future trials, statements to the  
23 mother -- which are not testimonial -- they will come in  
24 through the mother without any screen for reliability  
25 under the Constitution at all. So in that respect, the

1 defendant here got more by virtue of the Roberts rule  
2 than by -- than he would have had by virtue of the  
3 Crawford rule.

4 JUSTICE SCALIA: Is that the case in Federal  
5 courts, too?

6 MR. GORNSTEIN: Well, it is a matter of  
7 interpreting -- what protection is left is only going to  
8 be by virtue of the residual hearsay rule. So there  
9 will have to be some determination made about whether  
10 there are sufficient guarantees of trustworthiness.

11 JUSTICE SCALIA: I mean, it is conceivable  
12 that Federal courts would interpret the hearsay rule to  
13 require precisely that anyway.

14 MR. GORNSTEIN: But Justice Scalia --

15 JUSTICE SCALIA: In which case you shouldn't  
16 be making this argument because it applies only to state  
17 courts.

18 MR. GORNSTEIN: No. I think it applies  
19 equally to Federal courts because it is free to the  
20 Federal court system to devise a rule that would allow a  
21 looser standard of entry than the Roberts standards, and  
22 if it did, that would be constitutional. So there is an  
23 interest in that kind of argument in the Federal system.

24 I wanted to move on to the bedrock aspect of  
25 the inquiry, which is a separate second inquiry that had

1 threshold that has to be crossed if you are going to  
2 find something to be watershed, and the only rule that  
3 the Court has found to be bedrock is Gideon. And this  
4 rule, Carawford does not approach Gideon in its  
5 fundamental and sweeping importance, and there are a  
6 couple of reasons for that.

7 First, the right to counsel pervasively  
8 affected all aspects of the criminal trial whereas this  
9 focuses on one limited -- the admissibility of one  
10 limited category of evidence, testimonial hearsay, and  
11 adopts a somewhat new rule for that than had existed  
12 before.

13 The second thing is that under, the right to  
14 counsel is deemed so essential to a fair trial that  
15 depriving someone of that right can never be discounted  
16 as harmless error, whereas Crawford errors can be  
17 harmless. There are a significant number of cases where  
18 they are found to be harmless. So you cannot say that a  
19 violation of the Crawford rule always and necessarily  
20 results in an unfair trial, whereas you can say that  
21 about the right to counsel.

22 Finally, the Gideon rule established for the  
23 first time a right to free counsel in all felony  
24 criminal trials. Before Crawford was established, there  
25 was a right to cross-examine. It simply was a different

1 right. You had a right to cross-examine the live  
2 witnesses and you had a right to screen out  
3 uncross-examined statements unless they met the  
4 reliability standard of Roberts. And the change that  
5 was made was one in which the Roberts rule was thrown  
6 out, and you can no longer get in uncross-examined  
7 statements with a determination of reliability.

8 But that is a modification or an incremental  
9 change in an existing right that previously existed to  
10 cross-examine, and instead -- unlike the Gideon rule,  
11 which established the right to counsel for the first  
12 time.

13 If the Court has nothing further.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 Mr. Gornstein.

16 Ms. Forsman?

17 ORAL ARGUMENT OF FRANCES A. FORSMAN

18 ON BEHALF OF THE RESPONDENT

19 MS. FORSMAN: Thank you very much, Mr. Chief  
20 Justice. Members of the Court:

21 This man was sentenced to life in prison  
22 based upon accusations that have never been tested by  
23 the only constitutionally reliable test that is now  
24 acceptable in this Court. There is no question that the  
25 statements that were admitted through the police officer

1 were testimonial. There is no question that if  
2 Mr. Bockting were tried today, that those statements  
3 would not have come in.

4           The government has argued that the  
5 reliability screen, so-called, that came from Roberts  
6 was sufficient, and it was only an incremental change  
7 when the Crawford decision was decided. The fact of the  
8 matter is that this Court found that the reliability  
9 screen that the government has discussed was  
10 fundamentally flawed.

11           And in this case, comparing the right to  
12 counsel to the right to cross-examination is easy. It  
13 is easy because it would not have mattered how many  
14 lawyers Mr. Bockting had. It would not have mattered if  
15 he had the finest lawyers in the country. It would not  
16 have mattered if he was Duke Power Company and had every  
17 lawyer at the highest hourly rate representing him. If  
18 he was unable to cross-examine his accuser, just as in  
19 Crawford -- in Crawford, there was even an audiotape of  
20 what the wife said. There was an audiotape. There was  
21 a police officer who listened to what she said. And  
22 this Court found that wasn't good enough.

23           JUSTICE SCALIA: Well, we didn't say in  
24 Crawford, I don't think we said in Crawford -- I ought  
25 to know, I suppose.

1 (Laughter.)

2 JUSTICE SCALIA: -- that the new rule  
3 produced greater accuracy. We said that it was the view  
4 of the framers of the Constitution that  
5 cross-examination, confrontation in that sense, was  
6 necessary for greater accuracy.

7 Now in our evaluation of what constitutes a  
8 landmark decision, are we bound to the framers' view of  
9 things? I mean, you know, maybe -- I'm not sure that if  
10 you apply a proper interpretation of indicia of  
11 reliability under Roberts, I'm really not sure whether  
12 it wouldn't be more accurate than confrontation, but  
13 that wouldn't matter to me, because confrontation is  
14 what the Constitution required and what the framers  
15 thought were necessary.

16 Am I bound, for purposes of the rule we're  
17 arguing about here, to what the framers think?

18 MS. FORSMAN: No, Your Honor, you are not  
19 bound to what the framers think. However, I think that  
20 you went far beyond simply saying that this was like  
21 quartering soldiers in discussing the confrontation  
22 clause and the right to confrontation. The opinion goes  
23 into at length why the Roberts rule was so fundamentally  
24 flawed. You talked about the kinds of decisions that  
25 were produced, although this Court said that this Court

1 had pretty much tacked to the same direction as the  
2 framers' view.

3 JUSTICE SCALIA: I think that discussion of  
4 the, you know, the contrary decisions that had been  
5 produced under Roberts was just for the purpose of  
6 justifying the overruling of a case that -- you know --  
7 that was not that old. It hadn't worked out as well as  
8 we maybe expected it would. But I don't think it was  
9 for the purpose of showing that it always produces  
10 unreliable results.

11 MS. FORSMAN: And I don't think that our  
12 burden would be to show that it always produces  
13 unreliable results. I think that this Court has clearly  
14 taken the position that the only constitutional  
15 reliability is the right to cross-examination. However,  
16 throughout your retroactivity jurisprudence, you have  
17 been able to distinguish easily between issues such as  
18 the exclusionary rule, the right to a cross-section of  
19 the community on a jury, and the right to  
20 cross-examination. I would point out to you, the  
21 decisions that made Bruton, for instance, retroactive,  
22 because the right to cross-examination went so directly  
23 to the integrity of the fact-finding process.

24 I think that one of the major difficulties  
25 in the argument being taken by the State --

1 JUSTICE KENNEDY: That's in an instruction,  
2 like Toomey versus Ohio. The judge is corrupt. It is  
3 just structural. You can't say that about Crawford, or  
4 can you?

5 MS. FORSMAN: I don't mean to say, Your  
6 Honor, that it is structural. I think the issue of  
7 whether something is structural error or harmless error  
8 has to do with whether or not it is measurable, not  
9 whether it's bedrock, not whether it's watershed, not  
10 whether it leads to better accuracy.

11 We know that, because in Teague, although  
12 Gideon was the only case explicitly referenced, there  
13 was also three other examples mentioned in Teague.  
14 There was a trial tainted by mob violence. There was a  
15 trial flawed because of the intentional introduction of  
16 perjured testimony. And there was a trial flawed by the  
17 introduction of testimony with regard to a coerced  
18 confession.

19 We know that two out of those three examples  
20 are actually subject to harmless error analysis. So  
21 this Court has never tied the issue of the elements of  
22 Teague or even the elements of the pre-Teague  
23 jurisprudence to the issue of whether something is  
24 structural or harmless. It is the issue, as it was in  
25 the more recent decision of Gonzalez-Lopez, of the right

1 to choice of counsel decision. They are what the Court  
2 looked to to determine the issue was, is it harmless, is  
3 it quantifiable. And in this case, courts are  
4 accustomed, appellate courts are accustomed to looking  
5 at the introduction of this kind of evidence and  
6 determining whether or not it is harmless.

7 The State has not taken a position before  
8 this Court that the Ninth Circuit was erroneous in  
9 determining that this evidence was prejudicial, and  
10 therefore affected the outcome.

11 So the issue of accuracy as defined by the  
12 State and by the government, the problem with that  
13 argument and the easiest way to see the problem in that  
14 argument is if you look to Gideon. Certainly we  
15 wouldn't argue that the insertion of counsel into a case  
16 may not result in what the State is defining as a more  
17 accurate result. The insertion of counsel into a case  
18 may well cause the exclusion of evidence. In fact, in  
19 many instances that is exactly what counsel does.

20 So their definition of accuracy if applied  
21 to the Gideon case would mean that Gideon would flunk  
22 that definition, and wouldn't be the case that has been  
23 so repeatedly referenced by this Court as an example of  
24 the kind of case that should be made retroactive.

25 JUSTICE GINSBURG: Ms. Forsman, what about

1 the cases we're had so far on this second Teague  
2 category? As far as I know -- well, we haven't found  
3 anything to be retroactive on collateral review so far,  
4 so this would be the first time.

5 MS. FORSMAN: It would be, Your Honor, and  
6 it is appropriate that this be the first time. As I  
7 previously referenced, those cases fell -- there are 12  
8 of them, by the way. There were 12 decisions post  
9 Teague applying the Teague analysis in which this Court  
10 did not find retroactivity. The Solicitor General is  
11 correct. Some of those were cases in which on  
12 collateral review, the petitioner was seeking to  
13 actually create a new rule and apply it retroactively.

14 But if we look to cases such as the  
15 retroactivity application of Batson, for instance, what  
16 this Court has found is that the Batson rule, the  
17 cross-section of the community on a jury, that the  
18 purpose of that rule was not created for the purpose of  
19 protecting against unjust convictions or ensuring the  
20 integrity of the fact-finding process. That was not the  
21 purpose of the Batson rule, this Court found that it  
22 wasn't the purpose of the Batson rule, and that  
23 therefore, it would not fall under the Teague exception.

24 That is not so when you talk about the  
25 purpose of the cross-examination rule.

1 JUSTICE GINSBURG: What about the decision  
2 that said Ring v. Arizona was not retroactive on  
3 collateral?

4 MS. FORSMAN: Again, in Schriro versus  
5 Summerlin, the issue there was an issue with regard to  
6 ultimate accuracy of a jury versus a judge. Again, this  
7 Court found that the evidence was -- the evidence was  
8 equivocal with regard to whether or not a judge findings  
9 or jury findings were more accurate.

10 Now you might say, well, that sounds a  
11 little bit like Roberts. The problem with that is that  
12 it isn't like Roberts, because under Roberts, the  
13 cross-examination right, which is something that we held  
14 so dear and connected so directly to the right to  
15 counsel, having counsel without the right to  
16 cross-examination, isn't much of a right.

17 JUSTICE KENNEDY: The problem with your  
18 case -- maybe it's our problem because it was our  
19 rule -- is that we're asked to adopt an across-the-board  
20 calculus as to the rule. In some cases, as I think you  
21 will have to concede, under the Roberts jurisprudence,  
22 the fact finding was more accurate.

23 In your case, what you are telling us is  
24 that the fact finding is far less accurate. But I think  
25 you are stuck unless you can give us some reason that we

1 depart with it. With a rule-made jurisprudence, we have  
2 to look at the rule in the whole universe of cases, not  
3 just your case. It seems to me that was the problem you  
4 had in arguing in this area, and maybe you can suggest  
5 some way out. I don't see it.

6 MS. FORSMAN: I can, Your Honor. The reason  
7 that I can is that the judge does not have the ability  
8 to see the cross-examination statement either. So if we  
9 start with the premise, when making this reliability  
10 determination, we would have to throw out all of the  
11 statements in Crawford and all of the previous cases  
12 which hold so dear the right to cross-examination and  
13 say, but a judge can make a reliability determination  
14 without ever hearing the statements cross-examined, can  
15 make them in that vacuum without ever testing the  
16 reliability of the statements with the -- with  
17 cross-examination.

18 And I don't know how you would be able to  
19 square that with the strong statements that are made in  
20 Crawford. And the strong statements that are made in  
21 the cases, for instance, in the case finding that Bruton  
22 should be retroactive, because it goes to the integrity  
23 of the fact-finding process. Unlike all of the other  
24 cases that you've talked about since Teague, the  
25 integrity of the fact-finding process is what is at

1 issue here. Do you have confidence in a result which is  
2 based upon an accuser's statements being admitted  
3 without ever having been cross-examined?

4 CHIEF JUSTICE ROBERTS: But Ohio versus  
5 Roberts was not overruled because of a judgment that it  
6 was not doing a good enough job in assessing reliability  
7 of these statements. It was overruled because of a  
8 judgment that the Founders wanted there to be  
9 cross-examination.

10 MS. FORSMAN: That's -- Your Honor, that is  
11 the base of the decision. It harkens back to what the  
12 Founders believed. However, the rule in Roberts was  
13 described variously from "amorphous to unpredictable,  
14 proof manipulable," to saying that the basis for the  
15 right to confrontation and cross-examination comes from  
16 a basic mistrust of, even to the levels of a judge in  
17 terms of accepting the testimony without the advantage  
18 of an actual adversary proceeding.

19 This case, of course, illustrates the dire  
20 need for cross-examination because the accuser in this  
21 case testified inconsistently at the preliminary hearing  
22 in this case and then was excused before  
23 cross-examination was allowed. The accuser in this  
24 case, who was sent to a counselor by the district  
25 attorney, when she went to the counselor refused to

1 knowledge that the incident happened, according to the  
2 testimony of the counselor.

3 And because the court -- and the record is  
4 very scant on what happened here -- the court, the trial  
5 court for instance, under Roberts made only a couple of  
6 findings and he said the testimony was consistent -- he  
7 didn't look at the fact that it had been inconsistent on  
8 at least two other occasions -- and said it was  
9 chronological, at least according to what the police  
10 officer said.

11 And so there were only a couple of findings  
12 by the trial court at all with respect to --

13 CHIEF JUSTICE ROBERTS: You had the  
14 opportunity to challenge those findings under the  
15 Roberts regime in state court?

16 MS. FORSMAN: We did. We did, and that --  
17 and that issue was not reached by the Ninth Circuit  
18 because after we had argued the case in the Ninth  
19 Circuit the Crawford decision was decided; and it was at  
20 that point that the Ninth Circuit picked up on the  
21 Crawford, and they didn't decide the issue of whether or  
22 not Roberts would have meant that this testimony was  
23 unreliable anyway.

24 JUSTICE BREYER: You can still argue -- what  
25 hearsay exception did it come in under?

1 MS. FORSMAN: It came in under a Nevada  
2 statute which was patterned after Roberts. It came in  
3 under a Nevada statute --

4 JUSTICE KENNEDY: Adequate indicia of  
5 reliability.

6 JUSTICE BREYER: Adequate indicia of  
7 reliability?

8 MS. FORSMAN: Yes, adequate -- basically,  
9 indicia of reliability. It didn't go into -- it didn't  
10 go into too much more detail than that. It just simply  
11 required that, a witness under ten, the court must find  
12 that the, that the statement is reliable and the  
13 statements are reliable, and then --

14 JUSTICE BREYER: Is that universal in  
15 Nevada? I mean, is they are no more hearsay rule in  
16 Nevada, that you just evaluate hearsay straight out in  
17 every case?

18 MS. FORSMAN: No. No. That was a statute  
19 that was adopted specifically for child witnesses.

20 JUSTICE GINSBURG: This is for children  
21 under ten, isn't it?

22 MS. FORSMAN: Children under ten.

23 JUSTICE GINSBURG: As you just said.

24 MS. FORSMAN: That's correct.

25 JUSTICE GINSBURG: And here we had someone

1 who was six years old and was hardly articulate, it  
2 seems from the little we have of this record. So the  
3 Nevada statute I think was very specific to children and  
4 was not --

5 MS. FORSMAN: It was. Yes, yes. No, it  
6 was. It was adopted for witnesses under ten. This  
7 child actually was quite articulate in the preliminary  
8 hearing and was able -- was able to talk about the fact  
9 that she remembered talking to the police officer, that  
10 she remembered -- but then, but then in terms of trying  
11 to recall the incident, she was unable to recall the  
12 incident, and she was unable to recall it in any of the  
13 same detail that the police officer testified to.

14 So it wasn't -- you know, it wasn't a  
15 circumstance in which you had a child who simply  
16 couldn't speak or a child who couldn't describe what had  
17 occurred.

18 JUSTICE BREYER: So if you lose this case,  
19 you can go back to the Ninth Circuit and say, well, even  
20 under Roberts it shouldn't have come in?

21 MS. FORSMAN: I believe that's correct, Your  
22 Honor, because the Ninth Circuit did not reach that  
23 issue.

24 JUSTICE SOUTER: Would you comment,  
25 Ms. Forsman, on your opponent's argument based on

1 2254 (d) ?

2 MS. FORSMAN: Yes. I think the easiest way  
3 to explain our position on that is that what has been  
4 articulated here is that a retroactive -- a rule made  
5 retroactive by this court would be applicable to  
6 Mr. Bockting if he had not raised this issue or had been  
7 somehow procedurally defaulted along the way. In other  
8 words, in order to be able to get the advantage that was  
9 discussed by both the state and the government of the  
10 other sections of the statute which clearly recognize,  
11 as to the extent that it's relevant the sponsor of the  
12 legislation did, that you still have the power to make  
13 rules retroactive, but the only way that Mr. Bockting  
14 would be able to get advantage of that rule would be if  
15 the state court had never ruled on the merits of his  
16 claim or had made some sort of procedural ruling that  
17 meant that he was defaulted on the claim. So instead of  
18 Mr. Bockting, who has raised this question of being able  
19 to cross-examine his accuser from day one in the trial,  
20 he cannot have that rule applied retroactively to him.  
21 If instead he now, he goes back later and the court  
22 says, no, this is a successor petition, you can't, you  
23 can't get it, you can't come into our courtroom, the  
24 door is slammed on you, according to the state now  
25 there's no ruling on the merits of his claim, and that's

1 why that section of the statute would permit the  
2 retroactive rule to apply.

3 2254(d)(1), while it has the language  
4 clearly established, and the court asked some questions  
5 about that, I think it must be remembered that when that  
6 statute is being addressed, it's being addressed in  
7 state court -- or in Federal court, on Federal habeas.  
8 And so at the time that the petitioner is in Federal  
9 court, then the rule has been clearly established.

10 The 2254(d) --

11 CHIEF JUSTICE ROBERTS: That's not -- the  
12 state has to result -- the state -- it's adjudicated on  
13 the merits in state court and results in a decision that  
14 was contrary to clearly established Federal law.

15 MS. FORSMAN: Correct.

16 CHIEF JUSTICE ROBERTS: So it seems to me  
17 that the question is what was the law, what was the  
18 clearly established law at the time of the state  
19 decision.

20 MS. FORSMAN: 2254(d)(1), I think the only  
21 way that you can read that section compatibly with the  
22 four other sections which are quoted in our appendix 2  
23 of our brief, the only way that you can do that is to  
24 recognize, although this Court will recall that it has  
25 described AEDPA as not quite a silk purse of legislative

1 drafting, but the only way to make those sections  
2 compatible is to say, listen, what was going on when  
3 2254(d)(1) was written was we were talking not about the  
4 timing of the new rule, what we were talking about is  
5 who is it decided by, because before AEDPA was adopted  
6 it wasn't apparent that it must be a decision by you, by  
7 this Court, that established by the rule. So that's the  
8 first part.

9           And the second part is that it's not dicta.  
10 It is an actual holding of this Court that is to be  
11 looked to to determine whether or not the state court  
12 was wrong. And so the only way to read that is to say,  
13 listen, there has to be some meaning to retroactivity,  
14 and what does retroactivity mean? Retroactivity means  
15 like a nunc pro tunc order, that when you've determined  
16 that a new rule is retroactively applicable -- and  
17 certainly between AEDPA and the Teague exceptions, which  
18 you did say in Horn versus Banks, by the way, should be  
19 analyzed differently -- although it has not been tossed  
20 up to you directly as it has in this case, the meaning  
21 of the 2254(d)(1), you have repeatedly advised that  
22 Teague is still alive and well and that when you look to  
23 the application of whether a rule should be applied  
24 retroactively you look to the Teague exceptions, so we  
25 also look --

1 JUSTICE ALITO: Is there any language in  
2 2254(d) that could incorporate the Teague exceptions?

3 MS. FORSMAN: There is not language in  
4 2254(d)(1). The language -- the reason that we know  
5 that Congress was cognizant of Teague is that there is  
6 language throughout AEDPA, particularly in the sections  
7 that we've quoted to you, that are lifted directly from  
8 Teague.

9 JUSTICE ALITO: What would we say if we were  
10 to say that 2254(d)(1) accommodates the Teague  
11 exceptions, that Congress meant to put them in but just  
12 forgot to do it? How would we account for the language?

13 MS. FORSMAN: I think that what you would  
14 say is that  
15 Congress would not have deprived you of the power to  
16 make a rule retroactively applicable and would have not  
17 then created the ludicrous situation which the state  
18 suggests would occur here, which is instead of the  
19 motivation in Congress in having someone like  
20 Mr. Bockting raise the issue from the very beginning in  
21 one unitary proceeding, as opposed to going back, which  
22 is what they've suggested he must do in order to get the  
23 advantage of a retroactive rule, is that Congress was  
24 cognizant of that and in order to make all of the  
25 statute -- all of the provisions of the statute have

1 meaning and not render certain provisions, including the  
2 sections that we quoted, superfluous, that you must  
3 interpret that to mean that the -- that the -- that  
4 2254(d)(1) is not a timing statute. It's what law do we  
5 look to. That must be what they meant. Otherwise, the  
6 rest of it just doesn't make any sense.

7 JUSTICE ALITO: Isn't that making the tail  
8 wag the dog, because there's language in the provisions  
9 on successive petitions that refers to Teague, that you  
10 would read the Teague exceptions into 2254(d)(1) when  
11 there's nothing in the language there that can be  
12 interpreted to refer to them?

13 MS. FORSMAN: No. I don't believe that's  
14 the tail wagging the dog, because I don't think that  
15 that was the intent of 2254(d)(1). I think the  
16 intent -- again, I think the intent of 2254(d)(1) was in  
17 order to define what kinds of decisions the state court  
18 decisions should be measured against. There must be  
19 some kind of meaning to retroactivity, and retroactivity  
20 means that you are making this decision now and you're  
21 making it retroactive to the time. It is not going to  
22 be many things, as we know not only from your decisions,  
23 but as we know from the very small core of decisions  
24 that Teague left open. And it is those decisions where  
25 we must worry whether or not an innocent man has been

1 convicted. It is those rules that protect against  
2 those -- an unjust, an unwarranted, a wrongful  
3 conviction. It is only those rules that go to  
4 reliability, that go to the integrity of the  
5 fact-finding process, that you are going to let through  
6 that veil.

7           So if it is only that small core of rules  
8 that you reserved in Teague, only that small core of  
9 rules, and we know it won't be many at this point, then  
10 if you read that compatibly with AEDPA, it is not and,  
11 as we know, it is not going to open the floodgates.  
12 There is a very defined period of time in which people  
13 can bring actions for relief. Under your Dodd decision  
14 decision, there is only one year, not from the time that  
15 you make -- if you were to make, for instance, this  
16 decision retroactive, not from today, but it is one year  
17 from Crawford that petitioners have the opportunity to  
18 be able to come into court within that statute of  
19 limitations with regard to the date on which a new rule  
20 is adopted.

21           It is from that date forward. So there is a  
22 defined population. In appendix 1 of our brief, you  
23 will see all of the decisions that we could find that  
24 have actually applied Crawford and there were 49 of  
25 them. And what you'll find is that of the decisions --

1 and the state and the government have not disputed  
2 this -- of the 49 decisions which we were able to find  
3 at the time of the writing of that brief, only five  
4 actually resulted in relief. There's no question it  
5 would result in relief here because there is no  
6 contention before you that the Ninth Circuit's  
7 determination of harmfulness -- there is no  
8 determination before you; they haven't challenged that  
9 to you.

10                   So it would result in relief for  
11 Mr. Bockting. But because it's harmless error or it's  
12 not testimonial or there was a previous opportunity to  
13 cross-examine, of the 49 decisions only 5 were found to  
14 have to result in relief.

15                   And that is as it should be. The state  
16 argues that watersheddedness, if that's a word, is that  
17 watersheddedness must mean that it affects many, many  
18 decisions. Now, that can't mean what Teague means.  
19 Teague can't mean that my burden is to show you that  
20 many decisions will be overturned. That's the exact  
21 opposite of what Teague was decided for.

22                   Watersheddedness has to do with the  
23 alteration of our understanding. It is difficult for me  
24 to understand how the change of course as described by  
25 then Chief Justice Rehnquist, that the change of course

1 that Crawford represented in the way that we look at the  
2 right to confrontation cannot be, cannot be seen as  
3 precisely the alteration in the understanding of this  
4 bedrock principle again directly from the language of  
5 Crawford.

6 We ask you, Your Honors, to make the rule of  
7 Crawford retroactive and to affirm the determination of  
8 the Ninth Circuit.

9 JUSTICE STEVENS: Ms. Forsman, can I ask you  
10 a personal question? Were you a moot court finalist?

11 (Laughter.)

12 MS. FORSMAN: I was not.

13 JUSTICE STEVENS: I attend a moot court at  
14 Notre Dame in about your year and it was an awfully good  
15 moot court.

16 MS. FORSMAN: Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
18 Forsman.

19 General Chanos, you have two minutes  
20 remaining.

21 REBUTTAL ARGUMENT OF GEORGE J. CHANOS

22 ON BEHALF OF PETITIONER

23 MR. CHANOS: Thank you, Mr. Chief Justice.

24 I only have a few points.

25 First of all, counsel's argument with regard

1 to the interpretation of 2254(d)(1) clearly established  
2 language is inconsistent with the statement made --  
3 statements made by this Court in Lockyer and in Williams  
4 v. Taylor. In Lockyer, the Court stated Section  
5 2254(d)(1)'s clearly established phrase referred to the  
6 holdings, as opposed to the dicta, of this Court's  
7 decisions as of the time of the relevant state court  
8 decision, citing Williams v. Taylor. In other words,  
9 clearly established federal law under 2254(d)(1) is the  
10 governing legal principle or principles set forth by the  
11 Supreme Court at the time the state court renders its  
12 decision.

13 With regard to counsel's point about  
14 this case in particular, Bockting, I agree that there  
15 are broader issues beyond this particular fact  
16 situation. However, I want the Court to feel  
17 comfortable that when this Court sent this case back  
18 down to the Nevada Supreme Court and told the Nevada  
19 Supreme Court to follow Ohio -- Idaho versus Wright, the  
20 factors in Idaho versus Wright to determine  
21 trustworthiness, talk about spontaneity and consistent  
22 reputation -- repetition, mental state of declarant, use  
23 of terminology unexpected of a child of similar age, and  
24 lack of motive to fabricate. Particularized guarantees  
25 of trustworthiness must be so trustworthy that

1 adversarial testing would add little to its reliability.

2           Following that admonishment from this Court,  
3 the Nevada Supreme Court found those statements to be  
4 reliable and to satisfy the standards of Ohio -- Idaho  
5 versus Wright.

6           Finally, I would just point out that  
7 although Caldwell is indeed an important rule, and may,  
8 in fact, be a fundamental rule, so was Batson in Teague,  
9 as was Caldwell in Sawyer, as was Ring in Summerlin, as  
10 was Duncan in DiStefano as was Mills in Banks. Yet this  
11 Court failed to apply retroactive status to any of those  
12 important fundamental rules saying none of them rose to  
13 the level of Gideon versus Wainwright. The same should  
14 be true with your decision here with respect to  
15 Crawford.

16           Finally, as Justice Harlan stated in the  
17 case of McKay, talking about where this Court's  
18 retroactivity jurisprudence has come from, no one,  
19 not --

20           CHIEF JUSTICE ROBERTS: You can finish your  
21 sentence.

22           MR. CHANOS: Thank you.

23           CHIEF JUSTICE ROBERTS: Particularly if it  
24 is Justice Harlan you're quoting.

25           (Laughter.)

1                   MR. CHANOS: Thank you, Mr. Chief Justice.  
2 No one, not criminal defendants, not the judicial  
3 system, not society as a whole is benefitted by a  
4 judgment providing that a man shall tentatively go to  
5 jail today, but tomorrow and every day thereafter his  
6 continued incarceration shall be subject to fresh  
7 litigation on issues already resolved.

8                   Thank you.

9                   CHIEF JUSTICE ROBERTS: Thank you, General.  
10 The case is submitted.

11                   (Whereupon, at 12:02 p.m., the case in the  
12 above-entitled matter was submitted.)

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<b>A</b>	<p><b>adequate</b> 16:25 36:4,6,8</p> <p><b>adjudicated</b> 39:12</p> <p><b>admissibility</b> 24:9</p> <p><b>admitted</b> 19:1 25:25 34:2</p> <p><b>admonishment</b> 47:2</p> <p><b>adopt</b> 32:19</p> <p><b>adopted</b> 36:19 37:6 40:5 43:20</p> <p><b>adopts</b> 24:11</p> <p><b>advantage</b> 34:17 38:8,14 41:23</p> <p><b>adversarial</b> 47:1</p> <p><b>adversary</b> 34:18</p> <p><b>advised</b> 40:21</p> <p><b>AEDPA</b> 3:15 6:18 9:22 18:2 18:3,5,17 39:25 40:5,17 41:6 43:10</p> <p><b>affirm</b> 45:7</p> <p><b>age</b> 46:23</p> <p><b>agree</b> 14:10 46:14</p> <p><b>ALITO</b> 19:17 41:1,9 42:7</p> <p><b>alive</b> 40:22</p> <p><b>allow</b> 23:20</p> <p><b>allowed</b> 34:23</p> <p><b>alter</b> 3:21 8:2 13:7</p> <p><b>alteration</b> 44:23 45:3</p> <p><b>altered</b> 4:15 12:2</p> <p><b>alters</b> 12:14,24 13:24</p> <p><b>ambiguous</b> 11:3</p> <p><b>amendment</b> 11:25 12:4,8 12:10,11,13,19 12:23</p>	<p><b>amicus</b> 1:22 2:8 17:15</p> <p><b>amorphous</b> 34:13</p> <p><b>analog</b> 18:7,18</p> <p><b>analysis</b> 4:19 11:18,20 13:11 13:15 16:24 18:21 29:20 31:9</p> <p><b>analytical</b> 15:16</p> <p><b>analyzed</b> 40:19</p> <p><b>answered</b> 15:14</p> <p><b>anyway</b> 23:13 35:23</p> <p><b>apparent</b> 40:6</p> <p><b>appeal</b> 8:20 11:5</p> <p><b>APPEARAN...</b> 1:16</p> <p><b>appellate</b> 8:18 30:4</p> <p><b>appendix</b> 39:22 43:22</p> <p><b>applicable</b> 12:9 12:12,18,22 38:5 40:16 41:16</p> <p><b>application</b> 10:23 17:21 18:24 31:15 40:23</p> <p><b>applied</b> 18:12,15 21:23 30:20 38:20 40:23 43:24</p> <p><b>applies</b> 23:16,18</p> <p><b>apply</b> 3:10,16 6:1 8:15 18:6 27:10 31:13 39:2 47:11</p> <p><b>applying</b> 5:12 5:23 31:9</p> <p><b>approach</b> 24:4</p> <p><b>approaches</b> 21:4</p> <p><b>appropriate</b> 31:6</p> <p><b>arbitrarily</b></p>	<p>21:20</p> <p><b>area</b> 33:4</p> <p><b>argue</b> 30:15 35:24</p> <p><b>argued</b> 26:4 35:18</p> <p><b>argues</b> 44:16</p> <p><b>arguing</b> 7:4 27:17 33:4</p> <p><b>argument</b> 1:14 2:2,5,9,12 3:3 3:6 9:22,22 15:5,6,9,17 17:14 19:17,23 19:25 20:1 21:8 23:16,23 25:17 28:25 30:13,14 37:25 45:21,25</p> <p><b>Arizona</b> 32:2</p> <p><b>arrived</b> 17:2</p> <p><b>articulate</b> 37:1,7</p> <p><b>articulated</b> 38:4</p> <p><b>asked</b> 32:19 39:4</p> <p><b>asking</b> 20:11</p> <p><b>aspect</b> 23:24</p> <p><b>aspects</b> 24:8</p> <p><b>assessing</b> 34:6</p> <p><b>Assistant</b> 1:19</p> <p><b>assume</b> 8:10 9:4 18:2,12</p> <p><b>Atkins</b> 7:2</p> <p><b>attend</b> 45:13</p> <p><b>attorney</b> 1:17 34:25</p> <p><b>audiotape</b> 26:19 26:20</p> <p><b>authority</b> 17:2</p> <p><b>Autumn</b> 16:12 16:12</p> <p><b>awfully</b> 45:14</p> <p><b>a.m</b> 1:15 3:2</p>	<p>21:6 34:11 37:19 38:21 41:21 46:17</p> <p><b>bad</b> 9:22</p> <p><b>balance</b> 16:14 17:9</p> <p><b>Banks</b> 40:18 47:10</p> <p><b>bar</b> 4:21 6:25</p> <p><b>barely</b> 18:1</p> <p><b>barred</b> 11:19</p> <p><b>base</b> 34:11</p> <p><b>based</b> 25:22 34:2 37:25</p> <p><b>basic</b> 8:13 15:13 21:21 34:16</p> <p><b>basically</b> 36:8</p> <p><b>basis</b> 5:4,5 7:14 9:17 18:16 34:14</p> <p><b>Batson</b> 31:15,16 31:21,22 47:8</p> <p><b>bedrock</b> 3:22 4:15 11:22 12:1,2,5,14,17 12:25 13:6,9 14:6,20 15:16 23:24 24:3 29:9 45:4</p> <p><b>began</b> 7:24</p> <p><b>beginning</b> 41:20</p> <p><b>behalf</b> 1:18,21 1:24 2:4,7,11 2:14 3:7 17:14 25:18 45:22</p> <p><b>believe</b> 4:21 8:1 9:14 11:19,24 37:21 42:13</p> <p><b>believed</b> 34:12</p> <p><b>benefitted</b> 48:3</p> <p><b>better</b> 29:10</p> <p><b>Betts</b> 12:7,7,10 12:19</p> <p><b>beyond</b> 27:20 46:15</p> <p><b>bit</b> 32:11</p> <p><b>Bockting</b> 1:8 3:4</p>
		<b>B</b>		
		<p><b>b</b> 6:11</p> <p><b>back</b> 7:4,12,16</p>		

<p>16:13 26:2,14 38:6,13,18 41:20 44:11 46:14 <b>bound</b> 27:8,16 27:19 <b>boundaries</b> 8:8 <b>Brady</b> 12:7,8,11 12:19 <b>BREYER</b> 35:24 36:6,14 37:18 <b>brief</b> 21:17 39:23 43:22 44:3 <b>bring</b> 43:13 <b>broader</b> 46:15 <b>Bruton</b> 28:21 33:21 <b>built</b> 21:21 <b>built-in</b> 18:25 <b>burden</b> 28:12 44:19</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>C</b> 2:1 3:1 <b>calculus</b> 32:20 <b>Caldwell</b> 47:7,9 <b>call</b> 18:23 <b>Carawford</b> 24:4 <b>carryover</b> 18:18 <b>case</b> 4:25 8:15 8:17,19,20 11:6 12:6,16 12:19 16:4 19:16 20:8 21:20,22 22:5 22:11,13 23:4 23:15 26:11 28:6 29:12 30:3,15,17,21 30:22,24 32:18 32:23 33:3,21 34:19,21,22,24 35:18 36:17 37:18 40:20 46:14,17 47:17 48:10,11</p>	<p><b>cases</b> 3:11,16 4:9 13:4 21:17 24:17 31:1,7 31:11,14 32:20 33:2,11,21,24 <b>category</b> 6:19 24:10 31:2 <b>cause</b> 5:3,6,9 6:9 7:4 30:18 <b>central</b> 13:16 <b>certain</b> 42:1 <b>certainly</b> 4:11 30:14 40:17 <b>challenge</b> 19:11 35:14 <b>challenged</b> 44:8 <b>change</b> 8:18 10:2 25:4,9 26:6 44:24,25 <b>changed</b> 9:9 <b>Chanos</b> 1:17 2:3 2:13 3:5,6,8 4:1,3,8,20 5:2 5:20 6:2,22 7:22 8:5,9,21 9:2,7,10,14 10:5,16,19 11:6,10,13,23 13:15,18,24 14:18,24 15:2 15:19 16:3,7 16:12,20,23 17:12 45:19,21 45:23 47:22 48:1 <b>check</b> 22:10 <b>Chief</b> 3:3,8 4:17 4:20,23 5:15 5:21 17:9,11 17:17 18:1,4 18:11 25:14,19 34:4 35:13 39:11,16 44:25 45:17,23 47:20 47:23 48:1,9 <b>child</b> 36:19 37:7 37:15,16 46:23</p>	<p><b>children</b> 36:20 36:22 37:3 <b>choice</b> 30:1 <b>chronological</b> 35:9 <b>Circuit</b> 30:8 35:17,19,20 37:19,22 45:8 <b>Circuit's</b> 44:6 <b>circumstance</b> 37:15 <b>circumstances</b> 10:13 21:5 <b>cite</b> 18:2 <b>cited</b> 21:16 <b>citing</b> 46:8 <b>claim</b> 5:7 7:1,2,7 7:11,13,16 11:19 38:16,17 38:25 <b>clause</b> 27:22 <b>clear</b> 14:5 15:15 <b>clearly</b> 5:18 10:10,15,15,23 10:24 11:17 28:13 38:10 39:4,9,14,18 46:1,5,9 <b>coerced</b> 29:17 <b>cognizant</b> 41:5 41:24 <b>collateral</b> 3:11 3:16 31:3,12 32:3 <b>come</b> 22:6,23 26:3 35:25 37:20 38:23 43:18 47:18 <b>comes</b> 22:9 34:15 <b>comfortable</b> 46:17 <b>comment</b> 37:24 <b>common</b> 19:14 <b>community</b> 28:19 31:17 <b>Company</b> 26:16</p>	<p><b>comparing</b> 26:11 <b>compatible</b> 40:2 <b>compatibly</b> 39:21 43:10 <b>complies</b> 10:9 <b>component</b> 15:20 20:1 <b>components</b> 19:7 <b>concede</b> 32:21 <b>conceivable</b> 23:11 <b>conceivably</b> 5:12 6:8 <b>confession</b> 29:18 <b>confidence</b> 34:1 <b>confrontation</b> 12:1 13:5,13 13:19 14:6,13 14:14 27:5,12 27:13,21,22 34:15 45:2 <b>Congress</b> 6:3 7:19 8:1 10:6 10:11 41:5,11 41:15,19,23 <b>connected</b> 32:14 <b>consequences</b> 15:8,10,17 <b>consistent</b> 35:6 46:21 <b>constitutes</b> 27:7 <b>Constitution</b> 7:24 12:21 19:21 22:10,25 27:4,14 <b>constitutional</b> 23:22 28:14 <b>constitutionally</b> 25:23 <b>contention</b> 44:6 <b>continue</b> 11:18 <b>continued</b> 48:6 <b>contours</b> 13:10 <b>contrary</b> 5:16 5:18 10:22,24</p>	<p>10:25 28:4 39:14 <b>contrast</b> 13:2 <b>control</b> 8:22,23 <b>convicted</b> 21:3 43:1 <b>conviction</b> 3:20 4:14 18:7 43:3 <b>convictions</b> 17:23,24 18:6 18:23 19:6 31:19 <b>core</b> 42:23 43:7 43:8 <b>corpus</b> 20:19 <b>correct</b> 5:20 8:15 31:11 36:24 37:21 39:15 <b>CORRECTI...</b> 1:5 <b>corrupt</b> 29:2 <b>costs</b> 17:25 <b>counsel</b> 12:9,12 12:16,20 16:2 16:5 19:12 24:7,14,21,23 25:11 26:12 30:1,15,17,19 32:15,15 <b>counselor</b> 34:24 34:25 35:2 <b>counsel's</b> 45:25 46:13 <b>count</b> 19:14 <b>country</b> 26:15 <b>couple</b> 24:6 35:5 35:11 <b>course</b> 34:19 44:24,25 <b>court</b> 1:1,14 3:9 3:13 4:4,9 5:4 5:7,8,10,14 6:8 6:14,15,24 7:4 7:5,8,8,10,11 7:15 8:7,16,18 9:6,13,16,18</p>
---	---	--	---	--

<p>9:23,23,24 10:8,18,20 11:16 12:8 17:18 18:12,15 21:6,18,22 23:20 24:3 25:13,20,24 26:8,22 27:25 27:25 28:13 29:21 30:1,8 30:23 31:9,16 31:21 32:7 35:3,4,5,12,15 36:11 38:5,15 38:21 39:4,7,7 39:9,13,24 40:7,10,11 42:17 43:18 45:10,13,15 46:3,4,7,11,11 46:16,17,18,19 47:2,3,11 <b>courtroom</b> 38:23 <b>courts</b> 6:3,4,5,6 6:7 10:7,12 23:5,12,17,19 30:3,4 <b>court's</b> 8:21 11:4 46:6 47:17 <b>Crawford</b> 3:10 3:23 4:11,12 8:19 11:21,24 11:24,25 13:2 13:7,17,18,21 14:13 15:23,24 16:15 17:6,19 17:21,24 18:24 20:12,15 22:3 22:8,22 23:3 24:16,19,24 26:7,19,19,24 26:24 29:3 33:11,20 35:19 35:21 43:17,24 45:1,5,7 47:15</p>	<p><b>create</b> 31:13 <b>created</b> 7:24 31:18 41:17 <b>crime</b> 6:21 9:25 <b>criminal</b> 3:15,19 3:24 24:8,24 48:2 <b>crossed</b> 24:1 <b>cross-examina...</b> 13:14,20,23 14:1,12,14,16 15:9,22 16:2,5 16:7,8,9 19:18 19:19,22 20:10 26:12 27:5 28:15,20,22 31:25 32:13,16 33:8,12,17 34:9,15,20,23 <b>cross-examine</b> 19:9 20:6,7 24:25 25:1,10 26:18 38:19 44:13 <b>cross-examined</b> 33:14 34:3 <b>cross-section</b> 28:18 31:17 <b>curiae</b> 1:22 2:8 17:15</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>d</b> 3:1 5:16 <b>Dame</b> 45:14 <b>date</b> 43:19,21 <b>daughter</b> 22:13 <b>daughter's</b> 22:16,17 <b>day</b> 38:19 48:5 <b>dealt</b> 21:8 <b>dear</b> 32:14 33:12 <b>death</b> 21:17,19 <b>debatable</b> 19:19 <b>decide</b> 14:20 35:21 <b>decided</b> 8:20</p>	<p>17:24 26:7 35:19 40:5 44:21 <b>decides</b> 19:21 <b>decision</b> 5:16,18 5:23,25 6:20 6:20 9:13 10:8 10:9,18,20,22 11:4,14,15,16 12:2 20:16 26:7 27:8 29:25 30:1 32:1 34:11 35:19 39:13,19 40:6 42:20 43:13,14,16 46:8,12 47:14 <b>decisions</b> 17:1,4 20:17 27:24 28:4,21 31:8 42:17,18,22,23 42:24 43:23,25 44:2,13,18,20 46:7 <b>declarant</b> 46:22 <b>deemed</b> 24:14 <b>defaulted</b> 38:7 38:17 <b>defendant</b> 6:21 19:14 23:1 <b>defendants</b> 15:11 48:2 <b>defense</b> 16:2,5 19:12 <b>deference</b> 6:4,7 10:7,12 <b>define</b> 42:17 <b>defined</b> 30:11 43:12,22 <b>defining</b> 30:16 <b>definition</b> 15:16 30:20,22 <b>denial</b> 20:9 <b>denied</b> 7:14 9:16 <b>denies</b> 5:4 <b>deny</b> 7:7 <b>depart</b> 33:1</p>	<p><b>Department</b> 1:4 1:20 <b>depends</b> 14:9 <b>deprived</b> 41:15 <b>depriving</b> 24:15 <b>describe</b> 14:10 14:11,22 37:16 <b>described</b> 34:13 39:25 44:24 <b>detail</b> 36:10 37:13 <b>detective</b> 16:9 <b>determination</b> 5:8,11,14 6:5,6 6:12,14,16,24 7:6,10 16:24 19:2 22:6 23:9 25:7 33:10,13 44:7,8 45:7 <b>determinations</b> 15:12 <b>determine</b> 30:2 40:11 46:20 <b>determined</b> 40:15 <b>determining</b> 19:20 30:6,9 <b>developed</b> 7:25 <b>devise</b> 23:20 <b>dicta</b> 40:9 46:6 <b>difference</b> 8:25 9:2,3 22:19 <b>different</b> 4:25 24:25 <b>differently</b> 40:19 <b>difficult</b> 44:23 <b>difficulties</b> 28:24 <b>diminish</b> 17:22 18:22 19:5 <b>diminished</b> 3:21 4:14 15:22 16:17 17:8 21:1 <b>diminishment</b> 22:1</p>	<p><b>dire</b> 34:19 <b>direction</b> 28:1 <b>directly</b> 28:22 32:14 40:20 41:7 45:4 <b>DIRECTOR</b> 1:3 <b>disagree</b> 9:1 <b>discounted</b> 24:15 <b>discretion</b> 8:7 <b>discussed</b> 26:9 38:9 <b>discussing</b> 27:21 <b>discussion</b> 28:3 <b>dispense</b> 14:15 <b>disputed</b> 44:1 <b>DiStefano</b> 47:10 <b>distinction</b> 13:4 <b>distinguish</b> 28:17 <b>distinguishes</b> 20:4 <b>district</b> 34:24 <b>Dodd</b> 43:13 <b>dog</b> 42:8,14 <b>doing</b> 34:6 <b>door</b> 38:24 <b>drafting</b> 40:1 <b>Duke</b> 26:16 <b>Duncan</b> 47:10 <b>D.C</b> 1:10,21</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>e</b> 2:1 3:1,1 4:24 5:22 <b>easiest</b> 30:13 38:2 <b>easily</b> 28:17 <b>easy</b> 26:12,13 <b>effect</b> 18:18 <b>either</b> 11:3,6,9 11:11,19 17:19 33:8 <b>elements</b> 3:22 4:16 5:9 12:3 12:15,17,25 13:6,8,9 29:21</p>
---	---	---	---	--

<p>29:22  <b>emphasis</b> 13:23  <b>enacting</b> 8:3              10:6  <b>ensuring</b> 31:19  <b>entails</b> 17:25  <b>entirely</b> 6:19  <b>entitled</b> 3:14  <b>entry</b> 23:21  <b>enumerated</b>              6:10  <b>equally</b> 23:19  <b>equitable</b> 8:4,6              8:8  <b>equivalent</b> 9:5  <b>equivocal</b> 32:8  <b>erroneous</b> 30:8  <b>error</b> 24:16 29:7              29:7,20 44:11  <b>errors</b> 24:16  <b>ESQ</b> 1:17,19,23              2:3,6,10,13  <b>essential</b> 3:22              4:16 12:3,15              12:21,25 13:5              13:6,8,9 14:6,7              24:14  <b>established</b> 3:13              5:17,19 7:12              7:17 8:16              10:10,15,23,24              11:17 21:15,18              24:22,24 25:11              39:4,9,14,18              40:7 46:1,5,9  <b>evaluate</b> 36:16  <b>evaluation</b> 27:7  <b>event</b> 5:3  <b>evidence</b> 19:11              19:16 24:10              30:5,9,18 32:7              32:7  <b>exact</b> 21:12              44:20  <b>exacting</b> 3:12  <b>exactly</b> 10:16,19              11:10 14:8</p>	<p>30:19  <b>example</b> 4:1,3              20:4 30:23  <b>examples</b> 29:13              29:19  <b>exception</b> 3:18              31:23 35:25  <b>exceptions</b> 3:17              40:17,24 41:2              41:11 42:10  <b>exclusion</b> 30:18  <b>exclusionary</b>              28:18  <b>excused</b> 34:22  <b>exhausted</b> 20:20  <b>exist</b> 14:15  <b>existed</b> 24:11              25:9  <b>existing</b> 10:9              20:21 25:9  <b>expected</b> 28:8  <b>explain</b> 38:3  <b>explicitly</b> 29:12  <b>extent</b> 6:4 38:11</p>	<p><b>fall</b> 3:17 31:23  <b>far</b> 27:20 31:1,2              31:3 32:24  <b>fashion</b> 9:12              14:20  <b>favorable</b> 15:10  <b>federal</b> 5:6,10              6:3,7,8,14,25              7:8,8,11,15              9:18,23 10:7              10:23 13:5              18:6,7,12,15              18:18 23:4,12              23:19,20,23              39:7,7,8,14              46:9  <b>feel</b> 46:16  <b>fell</b> 31:7  <b>felony</b> 24:23  <b>final</b> 11:4,14,16              17:24  <b>finalist</b> 45:10  <b>finality</b> 20:22              21:6  <b>Finally</b> 24:22              47:6,16  <b>find</b> 4:10,11 6:9              24:2 31:10              36:11 43:23,25              44:2  <b>finding</b> 5:9              32:22,24 33:21              33:23  <b>findings</b> 32:8,9              35:6,11,14  <b>finest</b> 26:15  <b>finish</b> 47:20  <b>first</b> 6:19 18:25              21:10 24:7,23              25:11 31:4,6              40:8 45:25  <b>five</b> 44:3  <b>flawed</b> 17:1,5              26:10 27:24              29:15,16  <b>floodgates</b> 43:11  <b>flunk</b> 30:21</p>	<p><b>focuses</b> 24:9  <b>follow</b> 15:4              46:19  <b>following</b> 15:8              47:2  <b>forgot</b> 41:12  <b>formula</b> 14:21  <b>Forsman</b> 1:23              2:10 25:16,17              25:19 27:18              28:11 29:5              30:25 31:5              32:4 33:6              34:10 35:16              36:1,8,18,22              36:24 37:5,21              37:25 38:2              39:15,20 41:3              41:13 42:13              45:9,12,16,18  <b>forth</b> 46:10  <b>forward</b> 43:21  <b>found</b> 24:3,18              26:8,22 31:2              31:16,21 32:7              44:13 47:3  <b>Founders</b> 34:8              34:12  <b>four</b> 21:17 39:22  <b>framers</b> 27:4,8              27:14,17,19              28:2  <b>FRANCES</b> 1:23              2:10 25:17  <b>Frankly</b> 14:21  <b>free</b> 23:19 24:23  <b>fresh</b> 48:6  <b>friends</b> 15:17  <b>fundamental</b>              21:4 24:5 47:8              47:12  <b>fundamentally</b>              17:1,4 26:10              27:23  <b>further</b> 25:13  <b>future</b> 22:22</p>	<p style="text-align: center;"><b>G</b></p> <p><b>G</b> 3:1  <b>game</b> 14:9  <b>general</b> 1:17,20              3:5 4:1 17:11              18:14 19:18              31:10 45:19              48:9  <b>generality</b> 14:10  <b>generally</b> 3:15  <b>GEORGE</b> 1:17              2:3,13 3:6              45:21  <b>Gideon</b> 4:2,5              12:6,10 13:20              21:4 24:3,4,22              25:10 29:12              30:14,21,21              47:13  <b>Ginsburg</b> 3:25              4:6 6:17,22              9:20 10:5 21:7              30:25 32:1              36:20,23,25  <b>give</b> 3:25 6:3              10:7,12 21:25              32:25  <b>GLEN</b> 1:3  <b>go</b> 4:18,21 21:6              36:9,10 37:19              43:3,4 48:4  <b>goes</b> 27:22 33:22              38:21  <b>going</b> 6:18 7:4              20:23 21:6,16              21:23 23:7              24:1 40:2              41:21 42:21              43:5,11  <b>Gonzalez-Lopez</b>              29:25  <b>good</b> 15:18              19:19 26:22              34:6 45:14  <b>Gornstein</b> 1:19              2:6 17:13,14              17:17 18:4,14</p>
---	---	---	---	--

<p>19:24 20:15 21:11 22:12,17 23:6,14,18 25:15 <b>governing</b> 46:10 <b>government</b> 26:4,9 30:12 38:9 44:1 <b>grant</b> 9:25 <b>granting</b> 9:18 <b>greater</b> 27:3,6 <b>Griffith</b> 8:22 <b>guarantees</b> 19:3 22:7,21 23:10 46:24 <b>guess</b> 4:24 20:11</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>habeas</b> 7:10 8:2 8:4,6 9:15 20:19 39:7 <b>half</b> 21:13,14 <b>hand</b> 5:22 <b>happened</b> 35:1,4 <b>harkens</b> 34:11 <b>Harlan</b> 47:16,24 <b>harmfulness</b> 44:7 <b>harmless</b> 24:16 24:17,18 29:7 29:20,24 30:2 30:6 44:11 <b>hear</b> 3:3 17:13 <b>hearing</b> 33:14 34:21 37:8 <b>hearsay</b> 19:1,9 19:11,13,15 20:8 22:4,5,9 23:8,12 24:10 35:25 36:15,16 <b>held</b> 3:15 12:8 32:13 <b>highest</b> 26:17 <b>hold</b> 33:12 <b>holding</b> 40:10 <b>holdings</b> 46:6 <b>Honor</b> 27:18</p>	<p>29:6 31:5 33:6 34:10 37:22 45:16 <b>Honors</b> 45:6 <b>Horn</b> 40:18 <b>hourly</b> 26:17 <b>HOWARD</b> 1:8</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>Idaho</b> 46:19,20 47:4 <b>identifying</b> 8:7 <b>illustrates</b> 22:18 34:19 <b>implement</b> 13:25 <b>implicit</b> 12:20 <b>importance</b> 20:22 21:5 24:5 <b>important</b> 16:13 20:13,16,17 21:21 47:7,12 <b>imposed</b> 21:20 <b>inadequacy</b> 17:6 <b>inadequate</b> 14:3 <b>incarceration</b> 48:6 <b>incident</b> 35:1 37:11,12 <b>included</b> 19:8 <b>including</b> 42:1 <b>inconceivable</b> 9:11 <b>inconsistent</b> 35:7 46:2 <b>inconsistently</b> 34:21 <b>incorporate</b> 41:2 <b>incorrect</b> 16:6 <b>incremental</b> 25:8 26:6 <b>indicia</b> 14:3,16 16:25 27:10 36:4,6,9 <b>indictment</b></p>	<p>15:24 <b>infringement</b> 19:22 <b>innocent</b> 21:2 42:25 <b>inquiry</b> 23:25,25 <b>insertion</b> 30:15 30:17 <b>instance</b> 28:21 31:15 33:21 35:5 43:15 <b>instances</b> 30:19 <b>instruction</b> 29:1 <b>integrity</b> 28:23 31:20 33:22,25 43:4 <b>intended</b> 6:3 <b>intent</b> 42:15,16 42:16 <b>intentional</b> 29:15 <b>interest</b> 18:5,9 18:13,15 23:23 <b>interpret</b> 23:12 42:3 <b>interpretation</b> 8:19 27:10 46:1 <b>interpreted</b> 42:12 <b>interpreting</b> 23:7 <b>introduce</b> 19:10 <b>introduced</b> 19:10 <b>introduction</b> 29:15,17 30:5 <b>IRVING</b> 1:19 2:6 17:14 <b>issue</b> 3:18 8:13 19:21 29:6,21 29:23,24 30:2 30:11 32:5,5 34:1 35:17,21 37:23 38:6 41:20 <b>issues</b> 18:16,17</p>	<p>28:17 46:15 48:7</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>J</b> 1:17 2:3,13 3:6 45:21 <b>jail</b> 48:5 <b>job</b> 34:6 <b>judge</b> 29:2 32:6 32:8 33:7,13 34:16 <b>judgment</b> 11:5 34:5,8 48:4 <b>judicial</b> 16:24 48:2 <b>judicially</b> 7:24 <b>jurisprudence</b> 4:5 8:22 28:16 29:23 32:21 33:1 47:18 <b>jury</b> 19:12,14 28:19 31:17 32:6,9 <b>Justice</b> 1:20 3:3 3:8,25 4:6,17 4:20,23 5:15 5:21 6:17,22 7:18 8:4,6,9,10 8:12,24 9:4,8 9:11,20 10:5 10:14,17 11:2 11:8,11,21 13:11,16,22 14:8,19,24,25 15:4,5 16:1,4 16:10,19,21 17:9,11,17 18:1,4,11 19:17 20:11 21:7 22:11,15 23:4,11,14,15 25:14,20 26:23 27:2 28:3 29:1 30:25 32:1,17 34:4 35:13,24 36:4,6,14,20 36:23,25 37:18</p>	<p>37:24 39:11,16 41:1,9 42:7 44:25 45:9,13 45:17,23 47:16 47:20,23,24 48:1,9 <b>justifying</b> 28:6</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>KENNEDY</b> 7:18 11:21 13:22 16:1,4 16:10 20:11 22:11,15 29:1 32:17 36:4 <b>Kentucky</b> 7:2 <b>kind</b> 21:23 22:8 23:23 30:5,24 42:19 <b>kinds</b> 27:24 42:17 <b>know</b> 11:8 13:4 14:8,21,23 21:12 26:25 27:9 28:4,6 29:11,19 31:2 33:18 37:14 41:4 42:22,23 43:9,11 <b>knowledge</b> 35:1</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>L</b> 1:19 2:6 17:14 <b>lack</b> 46:24 <b>landmark</b> 27:8 <b>Lane</b> 3:13 <b>language</b> 10:21 15:23 39:3 41:1,3,4,6,12 42:8,11 45:4 46:2 <b>large</b> 21:2 <b>largely</b> 20:20 <b>Las</b> 1:18,23 <b>laughter</b> 15:1 27:1 45:11 47:25 <b>law</b> 5:17,19 7:12</p>
--	---	---	---	--

<p>7:17 8:16 9:8 10:10,15,23,24 11:15,17 18:11 18:15 20:21 39:14,17,18 42:4 46:9 <b>lawyer</b> 26:17 <b>lawyers</b> 26:14 26:15 <b>leads</b> 29:10 <b>left</b> 23:7 42:24 <b>legal</b> 46:10 <b>legislation</b> 38:12 <b>legislative</b> 39:25 <b>length</b> 27:23 <b>level</b> 9:16 14:9 17:6 47:13 <b>levels</b> 34:16 <b>life</b> 25:21 <b>lifted</b> 41:7 <b>light</b> 19:15 <b>likelihood</b> 3:20 4:13 17:22 18:23 19:5 <b>limitations</b> 43:19 <b>limited</b> 24:9,10 <b>Linkletter</b> 7:25 <b>listen</b> 40:2,13 <b>listened</b> 26:21 <b>litigation</b> 48:7 <b>little</b> 32:11 37:2 47:1 <b>live</b> 20:6 25:1 <b>Lockyer</b> 46:3,4 <b>long</b> 6:15 10:8,9 <b>longer</b> 25:6 <b>look</b> 5:7,22 7:9 7:11 10:20 12:6 13:2 15:7 15:16 30:14 31:14 33:2 35:7 40:22,24 40:25 42:5 45:1 <b>looked</b> 30:2 40:11</p>	<p><b>looking</b> 5:16 7:16 30:4 <b>looser</b> 23:21 <b>lose</b> 37:18 <b>lot</b> 8:7 <b>ludicrous</b> 41:17</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>major</b> 28:24 <b>making</b> 5:11 6:14 10:1 19:23 23:16 33:9 42:7,20 42:21 <b>man</b> 9:25 25:21 42:25 48:4 <b>manipulable</b> 34:14 <b>manner</b> 13:25 <b>MARVIN</b> 1:8 <b>matter</b> 1:13 23:6 26:8 27:13 48:12 <b>mattered</b> 26:13 26:14,16 <b>McKay</b> 47:17 <b>mean</b> 6:18,21,23 9:11,21 11:3 11:11 14:15 15:7 16:10 23:11 27:9 29:5 30:21 36:15 40:14 42:3 44:17,18 44:19 <b>meaning</b> 6:23 40:13,20 42:1 42:19 <b>means</b> 40:14 42:20 44:18 <b>meant</b> 5:24 35:22 38:17 41:11 42:5 <b>measurable</b> 29:8 <b>measured</b> 42:18 <b>meet</b> 3:12</p>	<p><b>Members</b> 25:20 <b>mental</b> 46:22 <b>mentioned</b> 29:13 <b>merits</b> 5:8,11,14 6:11,14,15,25 10:8 38:15,25 39:13 <b>met</b> 25:3 <b>Mills</b> 47:10 <b>minutes</b> 45:19 <b>mistrust</b> 34:16 <b>mob</b> 29:14 <b>model</b> 15:8,9 <b>modification</b> 25:8 <b>modifies</b> 13:10 13:24 <b>moot</b> 45:10,13 45:15 <b>mother</b> 16:8 22:18,19,23,24 <b>mother's</b> 22:13 <b>motion</b> 9:5 <b>motivation</b> 41:19 <b>motive</b> 46:24 <b>move</b> 23:24</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 2:1,1 3:1 <b>narrow</b> 3:17 20:24 <b>narrower</b> 13:13 <b>necessarily</b> 13:12 15:10 24:19 <b>necessary</b> 27:6 27:15 <b>need</b> 18:2 34:20 <b>Nev</b> 1:18,23 <b>Nevada</b> 1:4 36:1 36:3,15,16 37:3 46:18,18 47:3 <b>never</b> 24:15 25:22 29:21</p>	<p>38:15 <b>new</b> 3:15,18 5:18,23,25 13:20,22 17:3 21:8,13,21 24:11 27:2 31:13 40:4,16 43:19 <b>Ninth</b> 30:8 35:17,18,20 37:19,22 44:6 45:8 <b>non-testimonial</b> 22:4,5,9 <b>Notre</b> 45:14 <b>November</b> 1:11 <b>number</b> 21:12 24:17 <b>nunc</b> 40:15</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O</b> 2:1 3:1 <b>obscenity</b> 14:25 <b>occasions</b> 35:8 <b>occur</b> 17:3 41:18 <b>occurred</b> 37:17 <b>occurring</b> 14:2 <b>occurs</b> 4:6,8 10:11 <b>odd</b> 9:20 10:3 <b>officer</b> 20:7 25:25 26:21 35:10 37:9,13 <b>oh</b> 16:10,10 <b>Ohio</b> 13:3,25 14:2,5 15:23 29:2 34:4 46:19 47:4 <b>old</b> 28:7 37:1 <b>once</b> 20:20 <b>ones</b> 21:13,14 <b>open</b> 42:24 43:11 <b>operated</b> 19:7 <b>opine</b> 18:16 <b>opined</b> 18:17 <b>opinion</b> 27:22</p>	<p><b>opponent's</b> 37:25 <b>opportunity</b> 5:3 35:14 43:17 44:12 <b>opposed</b> 41:21 46:6 <b>opposite</b> 44:21 <b>oral</b> 1:13 2:2,5,9 3:6 17:14 25:17 <b>order</b> 38:8 40:15 41:22,24 42:17 <b>ordinarily</b> 18:16 <b>ought</b> 26:24 <b>outcome</b> 30:10 <b>overruled</b> 12:10 20:14 34:5,7 <b>overruling</b> 28:6 <b>overturn</b> 7:19 <b>overturned</b> 44:20</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 3:1 <b>PAGE</b> 2:2 <b>part</b> 40:8,9 <b>particular</b> 46:14 46:15 <b>particularized</b> 19:3 22:7,20 46:24 <b>particularly</b> 41:6 47:23 <b>pass</b> 8:1 <b>patterned</b> 36:2 <b>penalty</b> 21:17,19 <b>people</b> 21:3 43:12 <b>period</b> 43:12 <b>perjured</b> 29:16 <b>permit</b> 39:1 <b>personal</b> 45:10 <b>pervasively</b> 24:7 <b>petition</b> 7:6 9:15 38:22 <b>petitioner</b> 1:6,18</p>
---	--	---	---	--

<p>2:4,14 3:7 5:5 7:3,7 9:14 17:16 31:12 39:8 45:22 <b>petitioners</b> 43:17 <b>petitioner's</b> 5:7 <b>petitions</b> 42:9 <b>phase</b> 46:5 <b>picked</b> 35:20 <b>place</b> 14:4 <b>plain</b> 6:23 <b>play</b> 14:9 <b>please</b> 3:9 17:18 <b>plenty</b> 14:1 <b>point</b> 5:15 7:11 15:2,13,18,19 16:13 17:5 19:12 28:20 35:20 43:9 46:13 47:6 <b>pointed</b> 4:4 <b>points</b> 45:24 <b>police</b> 16:8 20:7 25:25 26:21 35:9 37:9,13 <b>population</b> 43:22 <b>position</b> 9:20 11:13 28:14 30:7 38:3 <b>post</b> 31:8 <b>power</b> 26:16 38:12 41:15 <b>pragmatically</b> 15:7 <b>precisely</b> 23:13 45:3 <b>preclude</b> 6:13 7:15 9:18 <b>precluded</b> 5:10 <b>prejudice</b> 5:3,6 5:9 6:9 7:5 <b>prejudicial</b> 30:9 <b>preliminary</b> 34:21 37:7 <b>premise</b> 33:9</p>	<p><b>presentation</b> 4:18 <b>pretty</b> 28:1 <b>prevent</b> 7:3 <b>previous</b> 33:11 44:12 <b>previously</b> 21:15 25:9 31:7 <b>pre-Teague</b> 29:22 <b>principle</b> 14:21 45:4 46:10 <b>principles</b> 46:10 <b>prison</b> 25:21 <b>pro</b> 40:15 <b>problem</b> 9:12 15:15 30:12,13 32:11,17,18 33:3 <b>procedural</b> 3:22 4:16 5:4 7:2,6 7:9,14 9:17 10:3 12:3,15 12:17,25 19:6 38:16 <b>procedurally</b> 38:7 <b>procedure</b> 3:19 3:24 7:14 <b>procedures</b> 8:2 <b>proceeding</b> 3:23 4:16 10:2,3 12:22 13:7,9 15:21 16:17 17:8 34:18 41:21 <b>proceedings</b> 9:21 10:4 20:25 <b>process</b> 28:23 31:20 33:23,25 43:5 <b>produced</b> 27:3 27:25 28:5 <b>produces</b> 28:9 28:12</p>	<p><b>productive</b> 15:11 <b>progeny</b> 8:1 <b>proliferate</b> 9:21 10:4 <b>promote</b> 19:8 <b>promotes</b> 22:3 <b>prong</b> 18:20 <b>proof</b> 34:14 <b>proper</b> 27:10 <b>proposed</b> 21:13 <b>protect</b> 43:1 <b>protecting</b> 31:19 <b>protection</b> 23:7 <b>provides</b> 5:2 <b>providing</b> 48:4 <b>provisions</b> 41:25 42:1,8 <b>purpose</b> 28:5,9 31:18,18,21,22 31:25 <b>purposes</b> 20:19 27:16 <b>purse</b> 39:25 <b>pursuant</b> 17:2 <b>put</b> 41:11 <b>p.m</b> 48:11</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>quantifiable</b> 30:3 <b>quartering</b> 27:21 <b>question</b> 8:12 16:15,16,21 18:3,3,5,10 21:15 25:24 26:1 38:18 39:17 44:4 45:10 <b>questions</b> 39:4 <b>quite</b> 37:7 39:25 <b>quote</b> 21:8 <b>quoted</b> 39:22 41:7 42:2 <b>quoting</b> 47:24</p> <hr/> <p style="text-align: center;"><b>R</b></p>	<p><b>R</b> 3:1 <b>raise</b> 41:20 <b>raised</b> 38:6,18 <b>rate</b> 26:17 <b>reach</b> 18:2,9 37:22 <b>reached</b> 8:17 35:17 <b>read</b> 39:21 40:12 42:10 43:10 <b>reading</b> 6:2,23 <b>real</b> 13:3 <b>really</b> 8:24 14:22 16:23 20:12 27:11 <b>reason</b> 19:4,25 21:25 32:25 33:6 41:4 <b>reasons</b> 18:21 24:6 <b>REBUTTAL</b> 2:12 45:21 <b>recall</b> 37:11,11 37:12 39:24 <b>received</b> 20:20 <b>recognize</b> 38:10 39:24 <b>recognizing</b> 9:24 <b>record</b> 35:3 37:2 <b>refer</b> 42:12 <b>referenced</b> 29:12 30:23 31:7 <b>referred</b> 46:5 <b>referring</b> 11:7 <b>refers</b> 42:9 <b>refused</b> 34:25 <b>regard</b> 29:17 32:5,8 43:19 45:25 46:13 <b>regime</b> 35:15 <b>Rehnquist</b> 44:25 <b>reinstated</b> 14:12 <b>relevant</b> 38:11</p>	<p>46:7 <b>reliability</b> 14:4,4 14:17 15:8 16:25,25 18:20 19:1,11,15 20:2,3 22:9,24 25:4,7 26:5,8 27:11 28:15 33:9,13,16 34:6 36:5,7,9 43:4 47:1 <b>reliable</b> 15:12 25:23 36:12,13 47:4 <b>relief</b> 3:14 4:22 5:4 8:6,8 9:17 9:19,25 43:13 44:4,5,10,14 <b>rely</b> 4:19 8:25 8:25 <b>relying</b> 8:13,14 <b>remaining</b> 45:20 <b>remembered</b> 37:9,10 39:5 <b>render</b> 42:1 <b>rendered</b> 9:13 <b>renders</b> 46:11 <b>reopening</b> 17:23 <b>repeatedly</b> 30:23 40:21 <b>repetition</b> 46:22 <b>represented</b> 45:1 <b>representing</b> 26:17 <b>reputation</b> 46:22 <b>require</b> 17:23 23:13 <b>required</b> 27:14 36:11 <b>requirement</b> 6:7 <b>requirements</b> 17:20 <b>reserve</b> 16:14 17:9 <b>reserved</b> 43:8</p>
---	--	--	--	---

<p><b>residual</b> 23:8  <b>resolved</b> 48:7  <b>respect</b> 17:3  18:20 22:2,4  22:25 35:12  47:14  <b>respondent</b> 1:24  2:11 3:14  25:18  <b>rest</b> 42:6  <b>result</b> 30:16,17  34:1 39:12  44:5,10,14  <b>resulted</b> 10:21  44:4  <b>results</b> 24:20  28:10,13 39:13  <b>retroactive</b> 4:10  4:10 5:1,13,24  7:21,21 17:20  18:24 20:16  21:10,16 28:21  30:24 31:3  32:2 33:22  38:4,5,13 39:2  41:23 42:21  43:16 45:7  47:11  <b>retroactively</b>  3:11 21:23  31:13 38:20  40:16,24 41:16  <b>retroactivity</b>  3:12 4:4 8:22  28:16 31:10,15  40:13,14,14  42:19,19 47:18  <b>reversing</b> 20:18  <b>review</b> 3:11,16  6:25 31:3,12  <b>right</b> 7:13 11:25  12:9,11,20  13:5,12,12,13  13:19,20,25  14:6,6,10,11  14:11,13,14,16  15:6 19:8,10</p>	<p>20:5,6 21:19  24:7,13,15,21  24:23,25 25:1  25:1,2,9,11  26:11,12 27:22  28:15,18,19,22  29:25 32:13,14  32:15,16 33:12  34:15 45:2  <b>rights</b> 12:16  13:19  <b>Ring</b> 32:2 47:9  <b>rise</b> 17:6  <b>risk</b> 21:2  <b>Roberts</b> 3:3 4:17  4:20,23 5:15  5:21 13:3 14:1  14:3,5 15:23  15:25 16:24  17:11,21 18:1  18:11,22,25  19:2,4,7 20:2  20:14 22:2,5  23:1,21 25:4,5  25:14 26:5  27:11,23 28:5  32:11,12,12,21  34:4,5,12 35:5  35:13,15,22  36:2 37:20  39:11,16 45:17  47:20,23 48:9  <b>rose</b> 47:12  <b>rule</b> 3:23 4:13  4:14,25 5:12  7:12,19,19,23  7:24 9:5 15:21  16:16 17:7,20  18:22 20:18  21:3,8,14,21  21:21,23 22:2  22:3,8 23:1,3,8  23:12,20 24:2  24:4,11,19,22  25:5,10 27:2  27:16,23 28:18  31:13,16,18,21</p>	<p>31:22,25 32:19  32:20 33:2  34:12 36:15  38:4,14,20  39:2,9 40:4,7  40:16,23 41:16  41:23 43:19  45:6 47:7,8  <b>ruled</b> 4:9 38:15  <b>rules</b> 3:15,19,21  20:24,25 21:13  38:13 43:1,3,7  43:9 47:12  <b>rule-made</b> 33:1  <b>ruling</b> 8:17  38:16,25</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>S</b> 2:1 3:1  <b>satisfy</b> 17:19  47:4  <b>Sawyer</b> 47:9  <b>saying</b> 10:1,6,12  10:14 11:24  12:16,20 27:20  34:14 47:12  <b>says</b> 5:16,22  10:21,25 20:18  38:22  <b>Scalia</b> 8:4,6,9,10  9:4,8,11 10:14  10:17 14:8,19  14:24,25 23:4  23:11,14,15  26:23 27:2  28:3  <b>Scalia's</b> 15:5  <b>scant</b> 35:4  <b>Schiro</b> 32:4  <b>screen</b> 14:4 19:1  20:3 22:24  25:2 26:5,9  <b>second</b> 3:18 7:6  7:10,13,16  15:20 19:4  23:25 24:13  31:1 40:9</p>	<p><b>section</b> 39:1,21  46:4  <b>sections</b> 38:10  39:22 40:1  41:6 42:2  <b>see</b> 14:23 30:13  33:5,8 43:23  <b>seeking</b> 31:12  <b>seen</b> 45:2  <b>self-sufficient</b>  19:25  <b>sense</b> 19:14 27:5  42:6  <b>sent</b> 34:24 46:17  <b>sentence</b> 47:21  <b>sentenced</b> 25:21  <b>separate</b> 23:25  <b>serious</b> 22:1  <b>seriously</b> 3:20  4:14 15:22  16:17 17:8,22  18:22 19:5  21:1  <b>set</b> 46:10  <b>show</b> 5:5 28:12  44:19  <b>showing</b> 28:9  <b>significant</b>  24:17  <b>silk</b> 39:25  <b>similar</b> 46:23  <b>simply</b> 5:25  16:15 24:25  27:20 36:10  37:15  <b>situation</b> 41:17  46:16  <b>six</b> 37:1  <b>Sixth</b> 11:25 12:4  12:8,11  <b>slammed</b> 38:24  <b>small</b> 42:23 43:7  43:8  <b>societal</b> 17:25  <b>society</b> 48:3  <b>soldiers</b> 27:21  <b>Solicitor</b> 1:20</p>	<p>31:10  <b>solved</b> 9:12  <b>somebody</b> 20:20  <b>somewhat</b> 11:2  24:11  <b>sorry</b> 8:5 16:3  16:20  <b>sort</b> 38:16  <b>sounds</b> 32:10  <b>source</b> 7:18,23  <b>SOUTER</b> 15:4  16:19,21 37:24  <b>so-called</b> 26:5  <b>speak</b> 37:16  <b>specific</b> 37:3  <b>specifically</b>  36:19  <b>sponsor</b> 38:11  <b>spontaneity</b>  46:21  <b>square</b> 33:19  <b>standard</b> 12:4  14:2 23:21  25:4  <b>standards</b> 3:12  6:10 23:21  47:4  <b>start</b> 33:9  <b>state</b> 5:4,8,13  6:4,4,5,15,17  6:24 7:4,5,10  8:16 9:5,13,16  9:23 10:8,12  10:18,20 11:16  23:16 28:25  30:7,12,16  35:15 38:9,15  38:24 39:7,12  39:12,13,18  40:11 41:17  42:17 44:1,15  46:7,11,22  <b>stated</b> 46:4  47:16  <b>statement</b> 19:10  19:12,13,15  20:8 22:21</p>
---	--	--	--	---

<p>33:8 36:12 46:2 <b>statements</b> 22:22 25:3,7 25:25 26:2 33:11,14,16,19 33:20 34:2,7 36:13 46:3 47:3 <b>states</b> 1:1,15,22 2:7 12:9,12,18 12:22 17:15 <b>stating</b> 10:7 <b>status</b> 47:11 <b>statute</b> 8:14,15 9:1 36:2,3,18 37:3 38:10 39:1,6 41:25 41:25 42:4 43:18 <b>STENO</b> 10:18 <b>STEVENS</b> 8:12 8:24 11:2,8,11 13:11,16 45:9 45:13 <b>straight</b> 4:21 6:18 36:16 <b>strong</b> 33:19,20 <b>structural</b> 29:3 29:6,7,24 <b>stuck</b> 32:25 <b>subject</b> 29:20 48:6 <b>submitted</b> 48:10 48:12 <b>subparagraphs</b> 6:11 <b>subsequent</b> 6:25 9:15 <b>substantive</b> 5:5 5:14 6:5,6,20 7:1,1,12 10:2 <b>successive</b> 42:9 <b>successor</b> 38:22 <b>sufficient</b> 23:10 26:6 <b>suggest</b> 4:25</p>	<p>33:4 <b>suggested</b> 41:22 <b>suggests</b> 41:18 <b>Summerlin</b> 32:5 47:9 <b>superfluous</b> 42:2 <b>SUPPORTING</b> 17:15 <b>suppose</b> 6:17 20:13 26:25 <b>Supreme</b> 1:1,14 46:11,18,19 47:3 <b>sure</b> 14:19 27:9 27:11 <b>susceptible</b> 19:22 <b>sweeping</b> 15:24 21:4 24:5 <b>system</b> 20:23 23:20,23 48:3 <b>systematically</b> 21:2</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1 <b>tacked</b> 28:1 <b>tail</b> 42:7,14 <b>tainted</b> 29:14 <b>take</b> 4:17 7:8 9:21 15:12 20:12 <b>taken</b> 28:14,25 30:7 <b>talk</b> 31:24 37:8 46:21 <b>talked</b> 27:24 33:24 <b>talking</b> 22:15 37:9 40:3,4 47:17 <b>tandem</b> 19:7 <b>Taylor</b> 46:4,8 <b>Teague</b> 3:13,15 4:19 5:13 6:19 7:19,20,23,25</p>	<p>8:11,14,25 11:18 18:3,21 20:18,18 29:11 29:13,22 31:1 31:9,9,23 33:24 40:17,22 40:24 41:2,5,8 41:10 42:9,10 42:24 43:8 44:18,19,21 47:8 <b>tell</b> 13:19 <b>telling</b> 18:8 32:23 <b>tells</b> 13:20,21 <b>ten</b> 36:11,21,22 37:6 <b>tentatively</b> 48:4 <b>term</b> 11:21 <b>terminology</b> 46:23 <b>terms</b> 34:17 37:10 <b>test</b> 25:23 <b>tested</b> 25:22 <b>testified</b> 34:21 37:13 <b>testimonial</b> 22:23 24:10 26:1 44:12 <b>testimony</b> 19:20 22:13,16,18 29:16,17 34:17 35:2,6,22 <b>testing</b> 33:15 47:1 <b>Thank</b> 17:11 25:14,19 45:16 45:17,23 47:22 48:1,8,9 <b>thing</b> 24:13 <b>things</b> 11:12 27:9 42:22 <b>think</b> 4:18 9:9 14:22 15:5,14 15:18 18:2 19:24 20:15</p>	<p>21:11 23:18 26:24 27:17,19 27:19 28:3,8 28:11,13,24 29:6 32:20,24 37:3 38:2 39:5 39:20 41:13 42:14,15,16 <b>third</b> 21:25 <b>thought</b> 5:17,24 9:22 27:15 <b>three</b> 18:21 21:17 29:13,19 <b>threshold</b> 24:1 <b>throw</b> 33:10 <b>thrown</b> 25:5 <b>tied</b> 29:21 <b>time</b> 4:9 8:16 10:17,20 11:3 11:4,15 16:14 17:10 21:10 24:23 25:12 31:4,6 39:8,18 42:21 43:12,14 44:3 46:7,11 <b>times</b> 21:7 <b>timing</b> 40:4 42:4 <b>today</b> 26:2 43:16 48:5 <b>told</b> 46:18 <b>tomorrow</b> 48:5 <b>Toomey</b> 29:2 <b>tossed</b> 40:19 <b>trial</b> 11:4 12:3 12:15 13:1 14:7 20:20 24:8,14,20 29:14,15,16 35:4,12 38:19 <b>trials</b> 17:3 22:22 24:24 <b>tried</b> 26:2 <b>true</b> 47:14 <b>truly</b> 12:24 <b>trustworthiness</b> 19:3 22:7,21 23:10 46:21,25</p>	<p><b>trustworthy</b> 46:25 <b>truthfulness</b> 19:20 <b>trying</b> 37:10 <b>tunc</b> 40:15 <b>two</b> 3:17 11:12 17:19 20:23 29:19 35:8 45:19 <b>two-step</b> 10:1</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimate</b> 32:6 <b>ultimately</b> 15:11 <b>unable</b> 26:18 37:11,12 <b>unacceptably</b> 21:2 <b>unavailability</b> 14:3 <b>uncross-exam...</b> 25:3,6 <b>understand</b> 15:2 44:24 <b>understanding</b> 3:21 4:15 7:22 12:2,14,24 13:8 44:23 45:3 <b>undone</b> 17:3 <b>unexpected</b> 46:23 <b>unfair</b> 24:20 <b>unitary</b> 41:21 <b>United</b> 1:1,14,21 2:7 17:15 <b>universal</b> 36:14 <b>universe</b> 33:2 <b>unjust</b> 31:19 43:2 <b>unpredictable</b> 34:13 <b>unreasonable</b> 10:10,22 <b>unreliable</b> 28:10 28:13 35:23</p>
---	---	--	--	---

<p><b>unwarranted</b> 43:2 <b>use</b> 11:21 46:22 <b>U.S</b> 7:23</p>	<p><b>watershedded...</b> 44:16,17,22 <b>way</b> 9:21 10:4 18:15 19:21 21:22 30:13 31:8 33:5 38:2 38:7,13 39:21 39:23 40:1,12 40:18 45:1</p>	<p><b>X</b> <b>x</b> 1:2,9</p>	<p>6:10 <b>25</b> 2:11 4:4</p>
<p><b>V</b> <b>v</b> 1:7 3:10 7:2 32:2 46:4,8 <b>vacuum</b> 33:15 <b>variously</b> 34:13 <b>Vegas</b> 1:18,23 <b>veil</b> 43:6 <b>versus</b> 3:4,13 4:5 12:7,7,8,11 12:19 13:3 14:1,2,5 15:23 29:2 32:4,6 34:4 40:18 46:19,20 47:5 47:13 <b>view</b> 11:9 27:3,8 28:2 <b>violation</b> 24:19 <b>violence</b> 29:14 <b>virtue</b> 23:1,2,8 <b>vis-a-vis</b> 13:3</p>	<p><b>weaknesses</b> 19:13 <b>Wednesday</b> 1:11 <b>weigh</b> 19:15 <b>went</b> 27:20 28:22 34:25 <b>We'll</b> 3:3 <b>we're</b> 10:5 12:16 12:19 27:16 31:1 32:19 <b>we've</b> 41:7 <b>wholesale</b> 17:23 <b>Whorton</b> 1:3 3:4 <b>wife</b> 26:20 <b>Williams</b> 46:3,8 <b>win</b> 11:8 <b>window</b> 20:24 <b>witness</b> 16:11 19:9 36:11 <b>witnesses</b> 20:6 25:2 36:19 37:6 <b>witness's</b> 19:20 <b>word</b> 11:2 44:16 <b>words</b> 16:17 38:8 46:8 <b>worked</b> 28:7 <b>worry</b> 42:25 <b>wouldn't</b> 9:12 27:12,13 30:15 30:22 <b>Wright</b> 46:19,20 47:5 <b>writing</b> 44:3 <b>written</b> 40:3 <b>wrong</b> 40:12 <b>wrongful</b> 43:2</p>	<p><b>Y</b> <b>year</b> 43:14,16 45:14 <b>years</b> 4:4 37:1</p>	<p><b>3</b> <b>3</b> 2:4 <b>4</b> <b>45</b> 2:14 <b>49</b> 43:24 44:2,13</p>
<p><b>W</b> <b>wag</b> 42:8 <b>wagging</b> 42:14 <b>Wainwright</b> 4:5 12:7 47:13 <b>want</b> 16:13 46:16 <b>wanted</b> 7:20 21:25 23:24 34:8 <b>Washington</b> 1:10,21 3:10 <b>wasn't</b> 9:25 16:1 16:4 26:22 31:22 37:14,14 40:6 <b>watershed</b> 3:19 3:23 4:11,12 4:12 15:20 17:20 20:24 21:9 24:2 29:9</p>	<p><b>0</b> <b>05-595</b> 1:7 <b>1</b> <b>1</b> 1:11 5:16 43:22 <b>11</b> 21:12 <b>11:04</b> 1:15 3:2 <b>12</b> 21:13 31:7,8 <b>12:02</b> 48:11 <b>14th</b> 12:10,12,18 12:23 <b>17</b> 2:8 <b>2</b> <b>2</b> 4:24 5:22 39:22 <b>2006</b> 1:11 <b>22(d)(1)</b> 8:23 <b>2254</b> 8:23 <b>2254(d)</b> 38:1 39:10 41:2 <b>2254(d)(1)</b> 4:19 4:21,22 6:2,24 8:2,3 10:6,12 10:21 18:6,7 39:3,20 40:3 40:21 41:4,10 42:4,10,15,16 46:1,9 <b>2254(d)(1)'s</b> 46:5 <b>2254(e)(1)</b> 4:24 <b>2254(e)(2)</b> 5:2 5:10 <b>2254(e)(2)(A)</b> 5:6 <b>2254(e)(2)(A)(i)</b> 6:8 <b>2254(2)(a)(i)</b></p>	<p><b>0</b> <b>05-595</b> 1:7 <b>1</b> <b>1</b> 1:11 5:16 43:22 <b>11</b> 21:12 <b>11:04</b> 1:15 3:2 <b>12</b> 21:13 31:7,8 <b>12:02</b> 48:11 <b>14th</b> 12:10,12,18 12:23 <b>17</b> 2:8 <b>2</b> <b>2</b> 4:24 5:22 39:22 <b>2006</b> 1:11 <b>22(d)(1)</b> 8:23 <b>2254</b> 8:23 <b>2254(d)</b> 38:1 39:10 41:2 <b>2254(d)(1)</b> 4:19 4:21,22 6:2,24 8:2,3 10:6,12 10:21 18:6,7 39:3,20 40:3 40:21 41:4,10 42:4,10,15,16 46:1,9 <b>2254(d)(1)'s</b> 46:5 <b>2254(e)(1)</b> 4:24 <b>2254(e)(2)</b> 5:2 5:10 <b>2254(e)(2)(A)</b> 5:6 <b>2254(e)(2)(A)(i)</b> 6:8 <b>2254(2)(a)(i)</b></p>	<p><b>5</b> <b>5</b> 44:13 <b>6</b> <b>60(b)</b> 9:5</p>